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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE TIMES-PICAYUNE PUBLISHING CORPORATION,
GANNETT NEWS SERVICE, INC.,
CAPITAL CITY PRESS, JOHN MARVIN HILL,
MARK SCHLEIFSTEIN, BRIDGET O'BRIAN,
AND LINDA LIGHTFOOT,
Petitioners

v

EDWIN W. EDWARDS, MARION EDWARDS,
GUS MIJALIS, JAMES J. WYLLIE, JR.
AND RONALD F. FALGOUT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the First Amendment, a presumption of openness attaches to proceedings arising during a criminal trial to inquire into possible tainting or bribery of the jury.

2. Whether, consistent with the First Amendment, a trial court may exclude the press and the public from these proceedings without affording interested persons a prior opportunity to be heard in opposition to closure; without making specific findings that closure is essential to preserve higher values and that closure is narrowly tailored to serve those interests; and without carefully considering alternatives to closure.

LIST OF PARTIES

The consolidated cases below are appeals from the closure of two separate mid-trial proceedings to inquire into the possible bribery or other tainting of the sequestered jury in the criminal racketeering trial of the incumbent Governor of Louisiana and four co-defendants. *United States of America v. Edwin W. Edwards, et al.* The petitioners are three of the news organizations that reported daily on the Edwards trial (The Times-Picayune Publishing Corporation,* Gannett News Service, Inc.,** and Capital City Press***) and reporters John Marvin Hill, Mark Schleifstein, Bridget O'Brian, and Linda Lightfoot, who were assigned by their respective news organizations to report on the criminal trial.

The respondents are the defendants in the criminal proceedings, Governor Edwin W. Edwards, Marion Edwards, Gus Mijalis, James J. Wyllie, Jr. and Ronald F. Falgout.

The United States of America did not appear as a party before the Court of Appeals.

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* The Times-Picayune publishes *The Times-Picayune*, a daily newspaper of general circulation in Southeast Louisiana. The Times-Picayune Publishing Corporation is wholly-owned through non-publicly traded intermediary corporations by Advance Publications, Inc., the Advance Voting Trust, sole voting stockholder.

** Gannett News Service, Inc. gathers news for newspapers, radio stations and television stations affiliated with Gannett Co., Inc. Gannett News Service, Inc. is a wholly-owned subsidiary of Gannett Co., Inc.

*** Capital City Press publishes the Baton Rouge, Louisiana *Morning Advocate* and *State-Times* newspapers. The shares of Capital City Press are not publicly traded.

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OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1a) is reported at 823 F.2d 111. The orders of the District Court (App. 22a-31a) have not been reported.

JURISDICTION

The petitioners are three news organizations and their reporters who objected to, and appealed from, orders of the District Court closing to the press and public mid-

trial proceedings during the course of a criminal trial. Although the criminal trial of the respondents ended with their acquittal on May 10, 1986, it is well established that cases arising from closure orders of this nature do not become moot upon the conclusion of the underlying proceedings. A controversy of this kind is "capable of repetition, yet evading review." *Press-Enterprise Co. v. Superior Court*, 478 U.S. ——, 92 L.Ed.2d 1, 9, 106 S.Ct. 2735 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979).

The judgment of the Court of Appeals was entered on July 31, 1987. (App. 32a-33a). On August 31, 1987, the Court of Appeals denied a timely filed petition for rehearing. (App. 34a-35a). On October 21, 1987, Justice White ordered that the time for filing this Petition be extended to and including November 29, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In September 1985, the incumbent Governor of Louisiana and seven co-defendants stood trial in federal court in Louisiana on multiple counts of racketeering, mail and wire fraud. The criminal trial of the State's governor was of great interest to the citizens of Louisiana and

generated intense publicity. (App. 2a). The jury was not sequestered. (App. 2a). Accordingly, the District Court entered a broad order which prohibited the trial participants from discussing the case publicly. (Order, United States District Court, March 8, 1985). The first trial ended in a mistrial when the jury could not reach a unanimous verdict as to the Governor and four of the seven co-defendants. (App. 2a).

The retrial of Governor Edwards and four co-defendants commenced in March, 1986. This time, the District Court ordered that the jury be sequestered (App. 2a); hence the court did not reimpose its order prohibiting public comment by the trial participants. Thus, from the outset of the second trial, the United States Attorney prosecuting the case, the Governor, his chief counsel, all other counsel, and the Governor's co-defendants were free to discuss the case publicly—which they did before television cameras and reporters on the courthouse steps each day, before, after, and at breaks in the proceedings.[1]

On two separate occasions during the retrial, reports reached the District Court that the sequestered jury had been tainted—including one report suggesting the possibility that an attempt had been made to bribe a juror. On April 17, 1986, a federal marshal reported to the District Court that one juror had commented to another juror that the jury in the Governor's first trial had been paid extra to vote for acquittal. (App. 3a).[2] The District Court informed all counsel in chambers, on the record,

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[1] It is undisputed that the trial participants were permitted to discuss all aspects of the second trial except for the proceedings at issue here. Indeed, at oral argument one judge of the Court of Appeals noted that he had observed the daily routine of public comment by the trial participants on the steps of the courthouse.

[2] Counsel for the respondents informed the Court of Appeals during oral argument about a report during the first trial that an acquittal vote was "going for $25,000." Also, according to counsel for the respondents, the FBI received a letter stating that two jurors in the first trial had been compromised. (App. 2a n.1).

of the report. (App. 3a). The prosecution immediately moved to excuse the jurors involved. (R.E. 72-73).[3] The prosecution suggested that the proceedings be conducted in open court. (R.E. 94-95). Defense counsel argued that proceedings conducted in open court could be intimidating to the jurors. (R.E. 94-95). The District Court then conducted closed proceedings in chambers during which motions to excuse two jurors were made; each juror was questioned at length by the Court and counsel; arguments were made by counsel; and the District Court denied the motions to excuse. (R.E. 72-119). The closed proceedings lasted more than two hours.

The District Court did not inform the press and public of its intention to conduct closed proceedings, meaning, of course, that the press and public had no opportunity to be heard on the issue of their exclusion. The individual petitioners and their many colleagues waited outside the courtroom, uncertain of what was transpiring in chambers, from 9:30 a.m., when the trial was to have resumed, until after noon, when the reporters observed counsel leave the Court's chambers. Counsel and the defendants told the reporters that the District Court had conducted unspecified closed proceedings in chambers but that the District Court had ordered all involved not to discuss the proceedings. Public comment on all other aspects of the trial remained wide open. At 1:15 p.m., petitioners filed an objection to the conduct of closed proceedings and to the sealing of the record of those proceedings. (App. 36a-37a). The petitioners specifically objected to the District

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[3] The redacted transcripts of the April 17 and April 22, 1986 closed proceedings were designated as part of the Record on Appeal in the Court of Appeals and copies were reproduced in Record Excerpts filed by Petitioners in that Court. In this Petition, "R.E. ——" refers to the pages of the Petitioners' Record Excerpts filed in the Court of Appeals. The unredacted transcripts of the closed proceedings were submitted to the Court of Appeals under seal. Counsel for petitioners have not been permitted to review them.

Court's failure to afford them an opportunity to be heard prior to closure. (App. 36a).

At 2:35 p.m. that same day, the District Court resumed taking trial testimony. The District Court filed an order sealing the record of the closed proceedings and ordering all counsel, the parties and court personnel not to discuss the matter publicly. (App. 22a-23a). The District Court's Order gave no hint of the seriousness or substance of the morning proceedings. The Order informed the public only that the Court had received a report that one of the jurors had discussed "some aspect of the previous trial" with another juror and that motions to excuse two jurors had been made by an unnamed party. (App. 22a). The District Court acknowledged that the jury was sequestered, but sealed the record of the proceedings because "there is a possibility, however slight" that the specifics of the motions to excuse might reach the sequestered jury. (App. 22a).

On April 21, 1986, the Petitioners filed a Notice of Appeal from the District Court's closure order. In addition, the Petitioners filed an Emergency Motion for an Expedited Appeal. (App. 4a n.2).[4]

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[4] In connection with the motion for expedited appeal, the Court of Appeals requested that the government advise the court of its position with respect to the closure of the April 17 and 22, 1986 proceedings. The government informed the Court of Appeals by letter of April 24, 1986 that "the Government's position is that the right of the public to a public trial in this instance outweighs any possible danger of breach of the jury sequestration." (R.E. 157). The Court of Appeals did not act on the petitioners' emergency motion until May 9, 1986, when the petitioners filed a Supplemental Memorandum advising that closing arguments were in progress, and that the court had not acted on petitioners' request for emergency relief. The Court of Appeals denied the petitioners' Emergency Motion for Expedited Appeal on the ground that the court saw no "abuse of discretion" by the District Court on the record submitted. The ruling was made without prejudice to further review on a "more complete briefing and a possibly fuller record. . . ." (App. 4a n.2, 20a-21a).

On April 22, 1986, the District Court received another report, this time from the matron suggesting that the jury may have been tainted. (App. 24a). According to the report, one juror had stated to another juror that each time the jury was dismissed one of the defendants would smile at the first juror and display an envelope. (App. 3a-4a). The first juror told the other juror that he could not help the defendant for less than $5,000. (App. 4a).

After receiving the matron's report, the District Court again conducted closed proceedings without informing the petitioners of its intention to do so and without providing the petitioners any opportunity to be heard. During the April 22, 1986 closed proceedings, the matron and the jurors involved were questioned by the Court and counsel; motions to excuse two jurors were made by several defense counsel; and counsel argued in support of and in opposition to those motions. (App. 4a; R.E. 124-155). Still in chambers, the District Court denied the motions to excuse. (App. 4a). The District Court dismissed the incident as "a tempest in a teapot, a joke." (App. 4a).

Later that day, the District Court issued another order sealing the record of the closed proceedings and prohibiting counsel, the parties and court personnel from discussing the proceedings. (App. 4a). The District Court's order made no mention that its inquiry related to possible bribery of the jury, but simply informed the public that the proceedings conducted in chambers involved "an incident in which a fellow juror commented about the actions of one of the defendants in the courtroom." (App. 24a).

At this point, then, although the trial participants were forbidden to discuss the closed proceedings, they remained free to engage in ongoing public comment on such diverse subjects as trial testimony, the motivation of the prosecutors, the guilt or innocence of the defendants, and related subjects. The District Court sought to justify its

order by explaining that jurors occasionally escape the boundaries of court supervision for such matters as medical appointments, contacts with family members and funerals (App. 24a-25a); but the District Court made no effort to reconcile those concerns with the continuing absence of any restriction on free public comment concerning all other aspects of the Governor's trial. The petitioners promptly supplemented their appeal to include review of the District Court's April 22 order. (App. 4a n.2).

On May 10, 1986, the jury returned a verdict of not guilty as to all defendants. (App. 4a). Shortly thereafter the petitioners moved for immediate access to the transcripts of the closed proceedings of April 17 and April 22, 1986. (App. 4a). After receiving memoranda from the respondents in opposition to unsealing the transcripts, the District Court on May 30, 1986 granted the motion in part and denied it in part, without a hearing. (App. 4a-5a, 30a-31a). The District Court held that it would release partial transcripts of the proceedings but would seal (apparently forever) the names of all jurors. The District Court also imposed a permanent seal on comments of counsel and the District Court itself dealing with "procedural matters," including any contemporaneous comments of the Court and counsel on the propriety of holding closed proceedings over the objections of the petitioners. (App. 4a-5a, 27a-30a). The petitioners appealed from that portion of the District Court's order which denied the petitioners' motion to unseal. The appeal was consolidated with the petitioners' prior appeal from the underlying closure orders of April 17 and April 22, 1986.

In their brief in the Court of Appeals, the respondents contended that the District Court was required neither to afford petitioners an opportunity to be heard, nor to make detailed findings as to the need for and scope of closure, on the ground that the mid-trial juror proceedings at issue constituted a bench or side bar conference.

(Brief for Appellees, pp. 18, 21-26, 29, 32).[5] At oral argument, however, the respondents acknowledged the length and contents of the proceedings (which included testimony, motions, and rulings thereon) and all but abandoned this contention. Instead, the respondents contended that mid-trial proceedings to determine possible bribery of the jury are so sensitive and unpredictable that public access to such proceedings is inherently disruptive. Accordingly, the respondents argued, mid-trial juror proceedings constitute a special class of trial proceedings which should not be subject to a First Amendment presumption of openness.

The Court of Appeals agreed with this contention and affirmed the District Court's orders in all respects. (App. 11a-13a, 16a, 19a, 32a-33a). The Court of Appeals held categorically that, because of their special sensitivity, "for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors." (App. 12a). The Court of Appeals further held that, in the case of proceedings involving potential tainting of the jury, including possible juror bribery, there is no requirement that the press and public be afforded a prior opportunity to be heard on the issue of closure. (App. 12a-13a).

The Court also affirmed the District Court's orders denying the press immediate access to the transcripts of the closed proceedings without an opportunity for a hearing (App. 14a-17a), even though the jury was sequestered and the District Court had found that there existed only "a possibility, however slight" that the specifics of the proceedings would reach the jury. Although the District Court did not release the redacted transcripts for some

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[5] *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, at 598 n.23 (Brennan, J. concurring in judgment) (interchanges at the bench and conferences in chambers distinct from trial proceedings and not subject to presumption of openness); *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

six weeks after the conclusion of the closed proceedings, the Court of Appeals affirmed the District Court's action as reasonable. (App. 14a-17a). Finally, the Court of Appeals concluded that a right of privacy shields jurors from revelations about purportedly embarrassing interactions during the course of trial and affords the trial court broad discretion to keep portions of the record confidential to protect juror privacy. (App. 17a-19a). Thus, the Court of Appeals affirmed the District Court's permanent excision of the names of the jurors who had been the focus of the closed proceedings (App. 19a). Finally, invoking the rubric of brief sidebar conferences of court and counsel, the Court of Appeals affirmed permanent sealing of all colloquy of the District Court and counsel relating to "procedural matters," including all colloquy directly relating to closure of the April 17 and April 22 proceedings. (App. 17a, 19a n.8).

REASONS FOR GRANTING THE WRIT

The judgments at issue here arose from the federal racketeering trial of an incumbent governor. In that historic context, the Court of Appeals recognized that mid-trial proceedings to inquire into possible bribery of the jury go "to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings." (App. 10a). Nevertheless, the Court of Appeals concluded that mid-trial juror proceedings are not presumptively open and that the proceedings could be closed without affording the petitioners any prior opportunity to address the need for closure or the scope of closure in this case. (App. 12a-13a).

The Court of Appeals reached its judgment, first, by asserting in conclusory fashion that mid-trial juror proceedings traditionally have been closed; and, second, by undertaking its own balancing of the competing interests in open and closed proceedings as those interests apply generally to all mid-trial juror proceedings. By this cate-

gorical line of reasoning, the Court of Appeals excused the District Court's failure to afford the petitioners any chance to address the proper resolution of the competing interests in this case. The Court of Appeals' ruling excused the District Court's failure to make the strict findings that are prerequisite to the closure of presumptively open trial proceedings. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court* (*"Press-Enterprise I"*), 464 U.S. 501, 510 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

This case, then, presents the important question whether the well-defined procedural and substantive framework of case-by-case closure adjudication established by *Globe* and other decisions of this Court can be short-circuited by a judicial determination that the need for secrecy outweighs the values of openness for an entire category of trial proceedings. The most serious consequence of this categorical determination is to deny interested persons like the petitioners any opportunity to express their opposition to closure, or to assist in shaping a proper alternative remedy, before both closure and the proceedings are a *fait accompli*. *Globe* itself struck down a legislative determination that the presumption of openness ought not apply to an entire category of trial proceedings. But the requirement of case-by-case adjudication applies with equal force to a judicial determination of categorical closure. Once a trial proceeding, as here, is found to implicate the "basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system," *Press-Enterprise I, supra*, 464 U.S. at 508, the First Amendment requires detailed, case-by-case reconciliation of the competing interests and an opportunity for interested persons to be heard. To our knowledge, no other Court of Appeals has concluded that a trial proceeding (other than a traditional sidebar or bench conference) may be closed absent compliance with this procedure, as *Globe* and its progeny require.

Globe, of course, is but one expression of fundamental First Amendment doctrine, which has long required highly specific, case-by-case reconciliation of competing constitutional interests when rights of free expression are at stake. The premises of the Court of Appeals' decision are sharply at variance with the basic First Amendment precepts in which *Globe* is rooted. The decision of the Court of Appeals requires the attention of this Court.

I. *Globe Newspaper Co. v. Superior Court* Requires That the First Amendment Right of Access to Specific Criminal Proceedings Be Determined by Weighing the Competing Constitutional Interests Involved on a Case-By-Case Basis.

The right of the public to attend criminal trials is now well established. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I*, *supra*, 464 U.S. at 509. Criminal proceedings can be closed to the public only if the trial court meets specific procedural and substantive requirements. The trial court must make

> specific, on the record findings . . . demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest. . . ." If the interest asserted is the right of an accused to a fair trial, the . . . hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Press-Enterprise Co. v. Superior Court (*"Press-Enterprise II"*), 478 U.S. ——, 92 L.Ed.2d 1, 13-14, 106 S.Ct. 2735 (1986) (citations omitted).

In *Globe*, this Court squarely held that a legislative determination that a particular type or category of

trial proceeding be closed without case-by-case adjudication is inconsistent with the First Amendment. There the Court held unconstitutional a Massachusetts statute which imposed a mandatory exclusion of the press and public from the trial of certain sex crimes during the testimony of a minor victim. The Court reversed a decision of the Massachusetts Supreme Judicial Court which had recognized the presumption of openness that attaches to criminal trials but held that trials involving sexual assaults constitute a "notable exception" to the presumption of openness. *Id.* at 601.

Although this Court readily acknowledged that the protection of the physical and psychological well-being of minors is a compelling interest, the Court held that even that important interest did not justify the blanket closure of all testimony by minor sex crime victims:

> [A]s compelling as that interest is, it does not justify a *mandatory* closure rule, for *it is clear that the circumstances of the particular case may affect the significance of the interest.* A trial court can determine on a *case-by-case basis* whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

Globe, 457 U.S. at 607-608 (footnotes omitted) (emphasis added).

Significantly, the Court also noted that to give meaning to the case-by-case resolution of competing interests, "representatives of the press and public must be given an opportunity to be heard on the issue of their exclusion." *Globe*, 457 U.S. at 609 n.25, *quoting from Gannett Co. v. DePasquale*, 443 U.S. at 401 (Powell, J., concurring). See also *id.* at 445-46 (Blackmun, J., concur-

ring; ". . . any person removed from a court should be given a reasonable opportunity to state his objections prior to the effectiveness of the order.")[6]

II. The Court of Appeals' Holding That Mid-Trial Proceedings and Motions Concerning the Tainting of the Jury are Categorically Outside the First Amendment Presumption of Openness Conflicts With *Globe's* Requirement That Closure of Trial Proceedings Must Be Determined on a Case-By-Case Basis, After Affording Interested Parties an Opportunity to Be Heard on Their Exclusion.

The Court of Appeals held that protracted mid-trial proceedings and motions to determine if the jury has been tainted or bribed fall outside the presumption of openness that attaches to criminal trials generally. Thus this case presents the question whether the important substantive and procedural requirements that go hand-in-hand with the First Amendment right of access to criminal trials may be abrogated categorically as to a particular portion of a criminal trial which the Court of Appeals characterized as especially sensitive to public scrutiny. Foremost among these procedural requirements, of course, is the requirement of a case-by-case determination of the need for closure, after an opportunity for interested parties to be heard, a requirement which the Court of Appeals found wholly inapplicable in this case by reason of the category of trial proceeding involved.

The Court of Appeals has created a class of proceedings outside the First Amendment right of access. The Court of Appeals reasoned, first, that mid-trial questioning of impaneled jurors has "traditionally been closed to the public" (App. 11a) and, second, that the public conduct of such proceedings invariably "would substantially raise

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[6] This Court's requirement of a prior opportunity to be heard on closure has been widely cited and followed by the Courts of Appeals. See n.10, *infra*.

the risk of destroying the effectiveness of the jury as a deliberative body." (App. 11a). Thus, the Court of Appeals concluded, juror misconduct proceedings conducted during trial are not presumptively open to the public;[7] they are not subject to the procedural and substantive requirements of *Richmond, Globe* and *Press-Enterprise I & II* (including *Globe's* requirement of case-by-case adjudication and an opportunity for those opposing closure to be heard); and the petitioner's First Amendment interests, and those of the public, can be satisfied adequately by a qualified right to delayed release of a transcript of the proceedings, expurgated in the broad discretion of the trial court to protect "privacy" interests of the jurors and whatever selected statements of counsel and the Court fall within the elastic concept of a "bench conference."

The Court of Appeals' central "historical" conclusion—that juror misconduct proceedings have "traditionally" been closed—is pure assertion. It is unsupported by citation to any caselaw, treatise, article, or authority of any kind. The petitioners specifically questioned this assertion in their briefs in the Court of Appeals and at oral argument. Decisions of the Fifth Circuit itself do not support the court's conclusion.[8] Historical evidence suggests that,

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[7] It is anomalous that a categorical exclusion from the presumption of openness would apply to mid-trial proceedings when the integrity of the jury specifically has been called into question but that routine, initial voir dire be subject to a strict presumption of openness, as *Press-Enterprise I* plainly requires.

[8] *See, e.g.*, in *United States v. Khoury*, 539 F.2d 441 (5th Cir. 1976) (*per curiam*), *cert. denied*, 429 U.S. 1040 (1977), where the defendant in a criminal action argued on appeal that the Court had improperly polled jury members in open court, rather than in chambers, to determine whether jurors had been tainted by a highly prejudicial news article. The Fifth Circuit rejected the defendants' argument and held that the District Court had not acted improperly by polling the jurors in open court. *See also Adjmi v. United States*, 346 F.2d 654 (5th Cir. 1965), *cert. denied*, 382 U.S. 823 (in-court questioning of jurors); *United States v. Sutherland*, 463 F.2d 641

to the contrary, there may have been longstanding recognition of the public nature of proceedings involving possible jury tainting.[9] At a minimum, the Court of Appeals' key historical premise is subject to serious doubt.

The second part of the two-part inquiry to determine if there is a First Amendment right of access to a particular proceeding is the "functional" test. In this second inquiry, "the court asks whether public access to the proceeding would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." *In re Washington Post Company*, 807 F.2d 383, 389 (4th Cir. 1986), *citing, inter alia, Globe*, 457 U.S. at 605-06 and *Press-Enterprise II*, 92 L.Ed.2d at 9-13. The functional analysis, as applied by this Court in *Globe* and in

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(5th Cir. 1972), *cert. denied*, 409 U.S. 1078 (jurors questioned in chambers and in open court); *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974) (jurors questioned in open court).

[9] For example, as a leading scholar of the history of the jury has noted, in the case of *Stephen Arrowsmith* (Old Bailey 1678), it is reported:

> Upon this the Jury went out again, and while they were deliberating, information was given to the Court, that they had the two Children [victims of the crime of statutory rape, with which Arrowsmith was charged] with them, which was against the Law. Whereupon the Officer appointed to keep them, was sent for, and it being sworn against him, that he had admitted them in, he was sent to *Newgate* [the jail near the Old Bailey], though he alleged [that] another Officer brought them to him as from the Court, but that Officer swore the contrary, and therefore the other was detained in Custody. *The Jury being sent for about this matter, when they came, said, they sent not for the Children, nor desired to have them*; and the Court to give further satisfaction, swore the Children, having examined them, whether they understood the nature of an Oath, and the danger of Perjury, which they gave a Rational account of. *And the Jury went away again.*

Cited and discussed in Langbein, *The Criminal Trial before the Lawyers*, 45 U. Chi. L. Rev. 263, at 293 (1978) (emphasis added).

both *Press-Enterprise* decisions, and by the Courts of Appeals in cases prior to the present one, stops at this point. Once the court has concluded that the type of proceeding under examination would serve important public purposes if allowed to remain open, competing considerations supporting closure are not weighed categorically or generically but are left to the scrutiny of case-by-case consideration on concrete facts.[10]

In the present case, however, the Court of Appeals has taken a markedly different path. Far from stopping with its own recognition of the strong functional reasons supporting open juror taint proceedings,[11] the Court of Ap-

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[10] *First Circuit: In re Globe Newspaper Co.*, 729 F.2d 47, 51-52 (1st Cir. 1984).

Second Circuit: In re New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (access to documents); *In re Application of Herald Co.*, 734 F.2d 93, 97-98 (2d Cir. 1984).

Third Circuit: United States v. Criden, 675 F.2d 550, 555-557 (3rd Cir. 1982); *United States v. Smith*, 776 F.2d 1104, 1108-09, 1111-12, 1114-15 (3rd Cir. 1985) (access to documents).

Fourth Circuit: In re Washington Post Company, 807 F.2d 383, 389 (4th Cir. 1986); *In re Knight Publishing Co.*, 743 F.2d 231, 234 (4th Cir. 1984).

Sixth Circuit: Applications of National Broadcasting Co. and WKYC-TV 3, 828 F.2d 340, 344-345 (6th Cir. 1987).

Ninth Circuit: United States v. Brooklier, 685 F.2d 1162, 1167, 1170-71 (9th Cir. 1982).

Eleventh Circuit: Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983).

[11] The Court of Appeals stated:

> It is clear from the outset . . . that the values of openness are implicated in today's case. The issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings. Once the spectre of a tainted jury is raised, public scrutiny of the resolution of the issue is essential, especially when, as here, the jury acquits.

(App. 10a).

peals proceeded to balance against these claims of openness its own evaluation of the need for closure in juror taint proceedings generally. (App. 11a-13a). This speculative description of the supposed sensitivity of juror taint proceedings to public view forms the centerpiece of the decision below—a categorical balancing of interests much like the reasoning of the Massachusetts Supreme Judicial Court upholding the closure statute at issue in *Globe* and rejected by this Court in that case. Similarly, this incorporation of a generalized interest balancing into the "functional" part of the closure analysis is directly at odds with prior decisions of this and other courts.

Granted that a mid-trial inquiry into bribery of the jury (like the testimony of minor victims of sex crimes in *Globe*) is a sensitive enterprise, and even assuming *arguendo* that questioning jurors publicly may in some circumstances complicate the process, *Globe* nevertheless requires that the competing constitutional interests applicable to a particular trial proceeding be reconciled in light of the specific circumstances of a particular case, after affording interested parties an opportunity to be heard, and after consideration of alternatives to total closure.[12] *Globe* teaches that a rule of categorical closure is not warranted simply because sensitive proceedings are

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[12] The Court of Appeals placed heavy reliance upon a qualified right of access to the transcript of mid-trial juror proceedings, which the Court viewed as a universal substitute for contemporaneous access to the proceedings. (App. 13a-14a). This remedy, however, reflects only another categorical resolution of the competing interests in open and closed proceedings. The considerations that require case-by-case adjudication of closure itself likewise require that specific alternatives to closure, including the release of transcripts, be considered on the record in the light of concrete facts. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976) (government-imposed delays in publication, no less than outright prohibition, interfere with traditional press function of prompt news coverage and implicate First Amendment values).

involved, whether juror taint proceedings or the testimony of minor sex crime victims.

Globe and its progeny requiring case-by-case adjudication of closure rest on a solid foundation, both pragmatically and doctrinally. From a practical standpoint, this case well illustrates why this Court has required particularized examination of the need for closure of specific proceedings—as opposed to *a priori* sociological observations about the supposed impact of public presence. Here the jury was sequestered. Reports of possible bribery of a juror in the criminal trial of Louisiana's Governor had been received by the District Court. The reports, though ultimately determined by the court to be inconsequential, raised serious issues as to the integrity of the jury; indeed, questions of possible jury taint had been raised in the defendants' first trial. Yet the District Court sealed the entirety of these important proceedings—juror testimony, marshals' testimony, motions, rulings—based only on the speculation that there was a "possibility, however slight" that the specifics of the proceedings might reach the sequestered jury.[13]

Meanwhile, the parties and their attorneys remained free to comment publicly on every other aspect of the trial and did so daily. These comments were widely reported by television stations and newspapers throughout Louisiana. Neither the District Court nor counsel for any party ever suggested that sequestration was not fully effective to protect the jury from prejudicial exposure to

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[13] The District Court's "slight possibility" determination falls far short of the finding, prerequisite to closure of trial proceedings, of "a substantial probability that the defendant's right to a fair trial will be prejudiced . . ." *Press-Enterprise II*, *supra*, 92 L.Ed.2d at 13-14, and cases cited therein. Thus the judgment of the District Court could be sustained on appeal only if the proceedings at issue were removed categorically, as they were by the Court of Appeals, from the reach of this Court's decisions governing trial closure.

news reports about the trial itself.[14] But the District Court held no hearing to consider whether closure of the juror proceedings alone was arbitrary, whether closure would effectively protect the defendants' fair trial rights, or whether a less drastic alternative to total closure would suffice.[15] Case-by-case adjudication, then, is essential to the avoidance of indiscriminate and overbroad closure orders.

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[14] *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 563-64 (approving sequestration of the jury as an effective means of insulating the jury from prejudicial news reports).

[15] Reasonable alternatives existed that warranted careful consideration by the District Court, such as: closing only part of the proceedings (i.e., conducting the questioning of the marshal and non-jurors in open court, conducting the arguments on motions to excuse in open court, issuing rulings in open court and immediately releasing the transcript of any closed portion of the proceedings); permitting a press pool representative to be present during the questioning of jurors; or engaging in more careful supervision of the sequestered jury.

The Court of Appeals suggests that the District Court was presented "precipitously" with reports of possible jury irregularities, that the course of the ensuing proceedings was "unknowable," and that these "practical difficulties" precluded a pre-closure hearing and excused the trial court from "halt[ing] the proceedings to provide a midcourse discussion of reasonable alternatives to closure." (App. 13a n.5). In fact, however, there were no practical obstacles to proper pre-closure procedure and the suggestion to the contrary has no foundation in the record; neither the District Court nor the respondents ever advanced such a suggestion. The petitioners' counsel had served as liaison between the District Court and media representatives throughout the two Edwards trials; the same petitioners had raised prior access issues in the case and had appeared swiftly at the Court's request to discuss these issues; and, more mundanely, not only were the individual petitioners literally standing in the hallways for several hours as the closed proceedings unfolded, but the offices of petitioners' counsel also are located just across the street from the District Court. There was no exigency that justified the District Court's decision to conduct closed proceedings of several hours duration before affording petitioners even a brief chance to be heard.

The decision of the Court of Appeals profoundly conflicts with basic First Amendment doctrine. *Globe's* rejection of categorical closure is not unique to the analysis of the First Amendment interests in public access to criminal trials. Rather, *Globe* follows directly from the basic proposition, subscribed to by all of the plurality and concurring opinions in *Richmond Newspapers*, that, where governmental action potentially infringes on First Amendment rights, the action must be exactingly crafted to achieve the governmental interest at stake without unnecessary abridgement of other rights.

Countless decisions of this Court prior to *Richmond Newspapers* have clearly established that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Phrased another way, "a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). Accord, *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 630 (1980), *reh. denied*, 445 U.S. 972. See generally Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). In order to avoid undue imprecision, it is always necessary under the First Amendment to focus precisely on the competing interest asserted, to reach a judgment concerning its importance, and then to determine whether the interest can be achieved through measures less drastic than those the government has implemented. *See, e.g., Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

449, 463-64 (1958); *see generally* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970).

The mechanism for avoiding unnecessarily broad closure orders, expressly contemplated by the Court in *Globe*, by the plurality in *Richmond Newspapers* and by the dissenters in *Gannett Co. v. DePasquale*, is a hearing at which all interested parties are afforded an opportunity to be heard prior to closure at which the trial judge may explore in some detail the precise interests at stake and alternatives less burdensome than closure by which those interests might be served. Such a hearing permits the court to base its decision on particularized facts rather than vague speculation. General findings like those of the Court of Appeals in this case by their nature cannot be accurate in each individual case. *See generally First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978), *reh. denied*, 438 U.S. 907. A pre-closure hearing is thus necessary to ensure that the First Amendment rights of the press and the public will not be abridged unnecesarily. That, at least, is the conclusion of virtually every other decision which has treated the issue in the wake of *Globe* and *Richmond Newspapers*.[16]

Although other Courts of Appeals have recently analyzed the prior hearing requirement as a matter of due process, *see, e.g., United States v. Raffoul*, 826 F.2d 218 (3rd Cir. 1987), to state that the First Amendment requires a hearing prior to closure is not necessarily to say that the hearing must be a full-blown evidentiary hearing. Certainly at a minimum it is necessary to provide that reasonable degree of participation which is necessary to guarantee a meaningful opportunity to influence the court's determination. *See generally Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). This case, however, does not require this

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[16] See cases cited at n.10, *supra*.

Court to define the parameters of the hearing requirement since the petitioners in this case were afforded no opportunity of any kind to be heard prior to closure.

Finally, the reach of the Court of Appeals' decision in this case is by no means confined to the facts of the two juror incidents which arose during the *Edwards* trial. Proceedings to examine impaneled jurors are not uncommon. More significantly, however, the decision below may be read as holding that each separate type of mid-trial proceeding that is not inescapably a part of every trial falls outside the holdings in *Richmond* and *Globe* that criminal trials are presumptively open to the public. According to the Court of Appeals, each different mid-trial proceeding may be subjected to generalized interest balancing under the "functional" rubric to determine whether the First Amendment presumption of openness "attaches" to that proceeding or does not.[17] If that presumption is found not to apply, the Court of Appeals' decision suggests that the proceeding may be closed without case-by-case adjudication or close scrutiny of the justification for closure. Indeed, in this case, the Court of Appeals upheld total closure of the proceedings based only upon the "possibility, however slight" of undue effect on a sequestered jury. Generalized interest balancing and its corollary, categorical closure, are incompatible with the basic premises of the Court's First Amendment access decisions.

In sum, then, the judgment of the Court of Appeals warrants review here not only because the decision is a significant departure from recent precedents of this Court, with potentially broad applicability in the future to other

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[17] Among the other proceedings which might be subjected to generalized closure analysis under the Court of Appeals' rationale are hearings to determine the mental or physical competency of a party to proceed or continue with trial; mid-trial motions to exclude evidence; hearings on motions relating to prosecutorial misconduct; and hearings on motions for a mistrial.

mid-trial proceedings, but also because the judgment below is inherently inconsistent with the bedrock First Amendment principle that infringement of First Amendment values must be narrowly tailored to support overriding governmental interests. The categorical closure of juror taint proceedings cannot be reconciled with this fundamental and well-established constitutional doctrine.[18]

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[18] The decision of the Court of Appeals also embraces another far-reaching constitutional assumption that conflicts with pronouncements of this Court and other circuits. Although no juror requested private questioning by the District Court, and the District Court's assigned reasons for closure were generalized concerns about the discomfiture and unease of the jury, the Court of Appeals determined that juror "privacy" interests warranted closure of the entire mid-trial inquiry in this case. *Compare Press-Enterprise I*, 464 U.S. at 515 (concurring opinion of Justice Blackmun; expressing concern that the Court "not assume the existence of a juror's privacy right without considering carefully the implications of that assumption;") and *Cable News Network v. United States and Deaver*), 824 F.2d 1046, 1048-1049 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3288 (October 19, 1987) (requiring individualized findings as to specific juror reasons for keeping private responses to specific voir dire questions; limiting juror privacy right to "deeply personal matters"; requiring affirmative juror request for private questioning; and requiring question-by-question analysis of need for closure).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-3298, 86-3495

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

v.

TIMES PICAYUNE PUBLISHING CORPORATION, and
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

July 31, 1987

Appeals from the United States District Court
for the Eastern District of Louisiana

Before WRIGHT,* GEE, and JOLLY, Circuit Judges.

GEE, Circuit Judge:

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* Circuit Judge of the Ninth Circuit, sitting by designation.

In today's case we find no first amendment violation in the closure of proceedings in which impaneled jurors were questioned about potential misconduct. We do conclude that the first amendment guarantees the public and press a qualified right of access to the record of such proceedings. Concerning permissible restrictions on this right of access, we find no constitutional infirmity in the trial court's orders declining to release transcripts of the closed proceedings during trial and his order permanently sealing portions of the record containing jurors' names and portions concerning issues traditionally discussed in bench conferences.

Facts

The appellants are three news organizations, the Times-Picayune Publishing Corporation, Gannett News Service, Inc., Capital City Press, and several of their reporters (referred to collectively as Times-Picayune). The adverse parties are the defendants named in the underlying action.

The press challenges proceedings and orders that arose during the second trial of Edwin Edwards and others for alleged racketeering and bribery. The first trial, a two and one-half month affair that generated much publicity, ended in a mistrial when the unsequestered jury was unable to reach a unanimous decision. In the second trial, the government moved that the jury be sequestered to protect it from "bias from outside influences." Besides the expected publicity, the first trial was tainted by rumors that jurors had been bribed.[1] The court ordered that the jury be sequestered in the second trial.

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[1] Counsel informs us that, during the first trial, defense counsel heard a report that an acquittal vote was "going for $25,000." Also, the FBI received a letter that two jurors in the first trial had been compromised.

Nine days into the trial the marshal reported that juror C had informed him as follows: juror B had remarked to juror C, "Did you know the last jury got paid for voting acquittal." The court and counsel conferred on record in chambers about how to proceed. The judge, the prosecutor, and two of the defense counsel questioned each juror individually in chambers, beginning with B and C. Juror C reaffirmed the original report; Juror B flatly denied it, later offering the substance of a conversation between the two jurors that may have been misconstrued by Juror C. During the course of these inquiries, the government suggested that they proceed in open court. The judge, urged by defense counsel, decided to continue informally in chambers, in order to encourage candor and to avoid intimidating the jurors. At the end of the proceedings, which lasted about two hours, motions to recuse were discussed. The judge determined that none of the jurors would be excused.

The press quickly filed an objection to this nondisclosure and to the lack of a preclosure hearing. Several hours later, without a hearing, the court ordered the record sealed and prohibited defense counsel and the prosecutor from making public comments about the issue. He explained only that the court had received a report that one juror had discussed "an aspect of the previous trial," and that motions to recuse jurors had been made and denied. He reasoned that nondisclosure was necessary "to preserve the impartiality of the jury," noting that "there is a possibility, however slight," that specifics would reach the jury. He cited an incident where marshals had already failed to cut out a small newspaper article in papers they had given to the sequestered jury.

Several days later, juror X reported to the matron that juror Y had confided that every time the jury was dismissed one of the defendants smiled and brought an

envelope to Y's attention; Juror Y states he is extremely nervous about this but says he couldn't help out for less than $5,000.

An *in camera* conference similar to the first one ensued, followed by questioning of jurors X and Y in chambers. Over the objections of the "offending" defendant's attorney, the court denied a motion to recuse the jurors involved, characterizing the event as a "tempest in a teapot, a joke." The court issued an order, describing the incident as one in which a juror relayed that "a fellow juror commented about the actions of one of the defendants in the courtroom." The order states that after questioning of the jurors' motions to recuse were denied, concluding that the juror's comment was of a "joking nature." The transcript was sealed because of the "possibility of specifics reaching the jury given the circumstances surrounding sequestration." The order goes on to discuss the necessity of permitting some public activities for jurors during a lengthy sequestration.

The jury returned a verdict of not guilty as to all defendants. Shortly thereafter the Times-Picayune filed a motion seeking full and immediate access to the sealed record. Some two weeks later, after receiving opposition and reply motions, the district judge issued a final order.[2] He released redacted transcripts from which he

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[2] Shortly after the first incident, Times-Picayune filed an expedited appeal to this Court, which it later supplemented to challenge the judge's management of the second incident. A panel of this Court denied the emergency motion for expedited appeal and petition for writ of mandamus. Based on the record before it, which included the full transcript of the challenged proceedings, the panel found no error in the closure or ban on public comment. It added, however, that its ruling was without prejudice to further review, with more complete briefing and a potentially fuller record, adding that the trial court should at the first instance decide after trial whether to perpetuate his order. Order, *United States v. Edwards*, et al., No. 86-3298 (May 9, 1986).

had eliminated jurors' names, portions that included "comments made by counsel which are not part of the arguments to excuse," parts dealing with "procedural matters," and portions that "if released would be unnecessarily embarrassing to the jurors involved." He lifted the prohibition on public comment, except as to those matters remaining under seal.

Times-Picayune raises a first amendment challenge to 1) the closure of the proceedings 2) the midtrial orders sealing the record and imposing a ban on public comment about the proceedings during the trial 3) the lack of a hearing for the press before closure and before the court issued its midtrial orders, and 4) the post-trial order that permanently seals portions of the record, notably jurors' names. The defendant-appellees assert that neither the court's actions nor its orders violate the first amendment.

The Law

We have jurisdiction under 28 U.S.C. § 1291. Insofar as any issue might be considered moot, the Supreme Court has determined that trial closure issues fall within that category of disputes that are "capable of repetition, yet evading review." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563, 100 S.Ct. 2814, 2820, 65 L.Ed. 2d 973 (1980); *see also United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978).

Some background is helpful in following the parties' arguments. In *Richmond Newspapers, Inc.*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Supreme Court recognized on behalf of the public and press a qualified first amendment right of access to criminal trials. Then in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), the Court declared unconstitutional a Massachusetts law mandating closure of trials concerning sex offenses

against minors, requiring instead a case-by-case approach to justifying closure. In *Press-Enterprise Co. v. Superior Court of Cal.* (*Press I*), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), the Court held that the closure of all but three days of a six-week voir dire proceeding violated the first amendment. *Press II* followed. *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. ——, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The proceeding at issue was a preliminary hearing, a procedure under the California penal code designed to determine whether there is probable cause to bind the defendant over for trial. That highly publicized case involved a nurse accused of killing patients with massive doses of a heart drug. The preliminary hearing took 41 days; only the prosecution presented evidence. The district court closed the proceedings and refused to release transcripts based on "a reasonable likelihood that release might prejudice the defendant's right to a fair and impartial trial." *Id.* at ——, 106 S.Ct. at 2739, 92 L.Ed.2d at 8. The Supreme Court held that the first amendment right of access to criminal proceedings extends to a preliminary hearing, that total closure of the prolonged hearing was insufficiently justified, and that it was therefore constitutionally infirm.

Following the principles in *Richmond*, *Globe*, and *Press I*, the Court in *Press II* recapitulated the two "complementary considerations" for determining whether a first amendment right of access attaches to the proceedings at issue: the court must determine (1) "whether the place and the process has historically been open to the press and general public," and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at ——, 106 S.Ct. at 2740, 92 L.Ed.2d at 10.

Press II reaffirms the guiding principles: that although the first amendment right of access is not absolute, once the right to access attaches the presumption

of openness can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Id.* at ——, 106 S.Ct. at 2743, 92 L.Ed.2d at 13 (citing *Press I* and *Globe*). Even though pretrial publicity posed a potential threat to the defendant's right to a fair trial, the *Press II* Court nevertheless recognized a presumption of openness concerning preliminary hearings and established that a preliminary hearing may be closed only if there are specific findings demonstrating a "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and that "reasonable alternatives to closure will not protect" the defendant's right to a fair trial. *Id.*

Attachment of the First Amendment Right of Access

We must first ascertain whether a first amendment right of access attaches. Times-Picayune argues that a first amendment right attaches here, characterizing the challenged proceedings as "supplemental voir dire" and relying on *Press I*. It asserts that we should look through the court's labeling of the procedures as "in chambers" conferences, as opposed to "trial proceedings," and perform a functional analysis. For example, in *United States v. Chagra*, 701 F.2d 354 (5th Cir.1983), we recognized a first amendment right to access to pretrial bail proceedings. In addition, the press argues, in *Rovinsky v. McKaskle*, 722 F.2d 197 (5th Cir.1984), our Court found that the defendant's sixth amendment right to a public trial was violated when the trial court conducted conferences in chambers to decide motions to limit the cross examination of two witnesses. In so doing, the Court ignored the "in chambers" label. Relying instead on first amendment access principles, the Court examined the "relationship of the issue at the hearing to the merits

of the charge, the outcome of the prosecution and the *integrity of the administration of justice.*" *Id.* at 201 (emphasis added).

Times-Picayune points to the Supreme Court's explications of the values served by open proceedings. For example, openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press I*, 464 U.S. at 501, 104 S.Ct. at 819. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond*, 448 U.S. at 572, 100 S.Ct. at 2825. The press notes that in today's case this was the second trial in which the governor and his codefendants were charged with bribery. The first (mis)trial was tainted with rumors that the jurors were bribed. The alleged misconduct here was a juror's discussion of bribery and a juror's impression that a defendant was offering a bribe. This, the press argues, directly implicates public confidence, or lack thereof, in the integrity of criminal proceedings and thus invokes the value of openness.

Adverting to the same line of cases, the defendants contend that because this type of proceeding has not historically been open, no first amendment right of access attaches. Therefore, the first amendment neither requires that this type of proceeding be conducted in open court, nor that the public and press obtain immediate and unfettered access to the record emanating from such proceedings.

Analysis

Our reading of precedent confirms that the Supreme Court has been careful to insulate this type of proceeding from unwarranted intrusion by the press and public. In *Richmond*, the Court recognized a presumption

of openness concerning criminal trial proceedings, but the Court was careful to include this caveat:

> We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public . . . but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose time, place, and manner restrictions . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to trial. " '[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

448 U.S. at 581 n. 18, 100 S.Ct. at 2830 n. 18 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941)).

In *Press I*, the Court cited this language with approval. 464 U.S. at 509 n. 10, 104 S.Ct. at 824 n. 10. In his concurrence in *Richmond*, Justice Brennan viewed the presumption of public trials as "not at all incompatible with reasonable restrictions":

> Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such proceedings are distinct from trial proceedings.

448 U.S. at 598 n. 23, 100 S.Ct. at 2839 n. 23.

The *Globe* Court cited this language with approval. 457 U.S. at 609 n. 25, 102 S.Ct. at 2621 n. 25. Our own court has explicitly acknowledged that bench conferences

are outside public hearing and the protection of their privacy is generally within the court's discretion. *Gurney*, 558 F.2d at 1210 (citing *United States v. Nixon*, 418 U.S. 683, 714, 94 S.Ct. 3090, 3110, 41 L.Ed.2d 1039 (1974)).

This sort of discretion historically extends to "jury matters." In *Gurney*, we affirmed that the press had no right of access to written communications between the judge and jury during deliberations; neither were they entitled under the first amendment to a list of jurors' names and addresses. *Id.* In a case involving restrictions on the press concerning their interviewing of discharged jurors, we stated: "A federal judge is not the mere moderator of a jury trial; he is its governor for the purpose of insuring its proper conduct." *United States v. Harrelson*, 713 F.2d 1114, 1117 (5th Cir.1983) (citing *Herron v. Southern Pacific Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931)). We reconfirmed in *Harrelson* that the trial court is accorded broad discretion, "based on law and on his own and common experience," over aspects of the trial concerning the "handling of jurors," e.g. sequestration, juror access to information, and "harassment of jurors." *Id.* at 1117.

It is clear from the outset, however, that the values of openness are implicated in today's case. The issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings. Once the spectre of a tainted jury is raised, public scrutiny of the resolution of the issue is essential, especially when, as here, the jury acquits. Applying the Supreme Court's test of "experience and logic" thus leads us, not to a facile answer, but to a quandary: the values of openness are significantly implicated in jury misconduct matters, yet the management of such matters, including control over the place and manner in which "jury" proceedings are conducted,

has historically been subject to the broad discretion of the trial court.

We turn to functional considerations for an answer. Experience and logic do indeed provide the reasons why midtrial proceedings involving the questioning of jurors have traditionally been closed to the public: holding such proceedings in open court would itself introduce an element of bias and would substantially raise the risk of destroying the effectiveness of the jury as a deliberative body. Whenever one juror reports the potential misconduct of another, the jury as an institution is instantly cast in jeopardy. It is vitally important to all parties, and it is the duty of the court, to ascertain whether the "offending" juror is biased and whether a taint of bias has affected other jurors. This process is different in several respects from the other types of proceedings found by the high court to be presumptively open—differences not of degree, but of kind. Wrenched from their neutral posture, the jurors themselves are suddenly cast on the defensive, facing counsel who are now their cross-examiners, a most difficult situation for all. During voir dire of potential jurors, counsel is armed both with challenges for cause and with peremptory challenges; counsel can probe to elicit indications of bias. Here, the jury, with a limited number of alternatives, is fixed.[3] At the risk of alienating sitting jurors, counsel must delicately ascertain whether bias now infects one or more of them, a task made doubly difficult when the juror accused flatly denies the claim. This process itself can create undesirable bias against the defendants whom counsel represent. The deleterious effects can only be exacerbated by requiring jurors to "defend" themselves in open court. As the process takes on an adversarial nature, counsel will likely demand recusals, even of those jurors whom they believe were not biased before the

[3] We note in passing that one juror had already been excused before these incidents occurred.

proceeding. The potentially divisive effects on relationships between jurors would be exacerbated by a "public hearing." If involved jurors are retained, the reservoir of goodwill between jurors, so important to reaching group consensus, is drained, thus increasing the potential that deliberations will end with a hung jury. If involved jurors are retained and the jury does convict, the defendant will almost surely contend on appeal that his sixth amendment right to a fair trial was violated.[4]

If the questioning of impaneled jurors were held in open court, there is a substantial probability that what may have begun as a "tempest in teapot" will end in a mistrial, a hung jury, or a reversal on appeal. The interest in preserving the jury as an impartial, functioning, deliberative body is not only a higher value than that served by openness here, it is a *sine qua non* of our system of criminal justice as envisioned in the sixth and seventh amendments. Thus, for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors. It fol-

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[4] A First Circuit case illustrates. In *United States v. Corbin*, 590 F.2d 398 (1st Cir. 1979), one juror reported that she had heard another juror state "He's guilty, he's guilty." The judge, with counsel present, questioned all jurors under oath. The offending juror vigorously denied having made the statement. Satisfied that the other jurors had not heard anyone make such a comment, the court found that the offending juror did not make the comment, but nevertheless took the step of excluding him from the jury, "in order to do whatever can be done, short of starting all over again next year, to rid the jury of any possible taint." The defendant, who was eventually convicted, challenged the court's failure to declare a mistrial, asserting that the court's investigation and findings were insufficient.

As this Court noted in *Harrelson*, while it is possible for the trial court to act with undue restrictiveness in jury matters, it is also possible for him to be too lax and to suffer reversal for that reason. 713 F.2d at 1117.

lows that the trial judge did not err in failing to provide a preclosure hearing.[5]

Disclosure of Transcripts

We find in *Press I* a framework for accommodating the values served by public access and the practical necessities of judicial administration of jury trials. In *Press I*, a rape case, the district court closed voir dire because he anticipated that jurors would be asked highly personal questions. The Supreme Court found unconstitutional the prolonged and total closure of the 41-day voir dire process. The Court noted however that a trial judge may "in the interest of the fair administration of

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[5] In so holding, we do not foreclose the possibility that the first amendment, under circumstances not presented in today's case, might require that proceedings involving the questioning of jurors be held in open court. We find no factors here, nor reasonable alternatives to closure, that would effectively mitigate the negative effect that open proceedings would have on the functioning of the jury as an institution. We note in passing that, to sustain a first amendment challenge, factors must exist to demonstrate that open proceedings would play a "significant positive role" in the functioning of the particular proceedings in question. *Press II*, 478 U.S. ——, 106 S.Ct. at 2740, 92 L.Ed.2d at 10.

It follows that, if such factors are timely brought to the trial court's attention, a preclosure hearing may be warranted. The practical difficulties of holding a hearing may, of course, preclude that possibility, as in the circumstances presented here.

The report of potential "jury misconduct" was precipitously presented to the trial judge. The proceedings that ensued were not analogous to the scheduled proceedings at issue in *Richmond* and its progeny, where the judge could question counsel to ascertain the anticipated contents of the proceedings. Here, the content and course of development of the proceedings were unknowable. Both sets of proceedings were confined to the questioning of jurors only; each inquiry lasted less than two hours, consuming less than four hours of time in a six-week trial. In these circumstances, there is no need for the court to halt the proceedings to provide a midcourse discussion of reasonable alternatives to closure.

justice, impose reasonable limitations on access." 464 U.S. at 511 n. 10, 104 S.Ct. at 824 n. 10.[6]

The Court suggested a reasonable alternative to accommodate all competing interests: "When limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." 464 U.S. at 512, 104 S.Ct. at 825.

Likewise, in today's case the availability of the transcript is the key to satisfying the constitutional values of public scrutiny. We conclude that the first amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct and raises a presumption that the transcript of such proceedings will be released within a reasonable time.

Disclosure Within a Reasonable Time

Times-Picayune argues that release must be contemporaneous, relying on *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir.1983). In that case, the Ninth Circuit held that the across-the-board sealing, albeit for only 48 hours, of all pretrial documents was impermissible. We note, however, that the constitutional violation in *Associated Press* rested on the lack of a showing sufficient to justify the blanket order sealing *all* documents, the availability of less restrictive alternatives, and the improbability that the closure orders would have any significant positive effect, given the extensive and continuing pretrial publicity in that case.

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[6] The *Press I* Court again reiterated that the question is "whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." 464 U.S. at 511 n.10, 104 S.Ct. at 824 n.10 (citing *Richmond*, 448 U.S. at 581-82 n.18, 100 S.Ct. at 2830 n.18).

The gravamen of the constitutional infirmities found in *Associated Press* are far afield from our inquiry, which addresses the timing of the (already-presumed) disclosure of the record.

The press contends that the first amendment mandates midtrial disclosure, because sequestration is sufficient to protect the jury from exposure to publicity. To the contrary, we conclude that, despite sequestration, midtrial publicity does continue to threaten the impartiality of the jurors. We previously noted the special volatility of publicity when it is focused, not on the merits of the case, but on the jurors themselves. If the substance of such incidents is played out in the press during trial, the difficulty is in insulating the jurors, not merely from media reports, but from remarks offered by others. As the district court noted, even when jurors are sequestered they are by necessity exposed to outsiders, from family members to fellow patrons in the doctor's office. The jurors are under a duty to report all untoward exposure to external information. Dutiful reporting by jurors necessitates further questioning in chambers, which leads to further media reports, from which all twelve jurors must be insulated. What may have begun as sound and fury can degenerate into a comedy of errors, only one of which need be harmful for the jury trial to be rendered a nullity.

Weighing against these difficulties are the values of prompt release. We recognize the worth of timely news reported on the front page and, by contrast, the diminished value of noteworthy, but untimely, news reported on an inside page. Implicit in that assessment, however, is the fair assumption that significant news will receive the amount of publicity it warrants. The value served by the first amendment right of access is in its guarantee of a public watch to guard against arbitrary, overreaching, or even corrupt action by participants in ju-

dicial proceedings. Any serious indication of such an impropriety, would, we believe, receive significant exposure in the media, even when such news is not reported contemporaneously with the suspect event.

The issue, simply stated, reduces to "Better sooner than later"? Given the paramount interest in maintaining an impartial jury, and its inherent vulnerability, we find no error in the district court's refusal to release transcripts of the closed proceedings before the jury reached its verdict. The trial court should nevertheless avoid unnecessary delay in releasing the record of closed proceedings after trial. When a motion is made for release of transcripts, the trial court should anticipate their probable post-trial disclosure and endeavor to release them as soon after verdict as possible.

Procedural Protections

In requiring a case-by-case resolution of the issues concerning closure of presumptively open proceedings, the *Globe* Court noted that, for this approach to be effective, "the press and general public must be given an opportunity to be heard on the question of their exclusion." 457 U.S. at 610 n. 25, 102 S.Ct. at 2621 n. 25. *Press II* requires, if closure of a presumptively open proceeding is to withstand a first amendment challenge, that the court make specific, on-the-record, factfindings demonstrating that a substantial probability exists that an interest of a higher value will be prejudiced and that no reasonable alternatives to closure will adequately protect that interest. 478 U.S. ——, 106 S.Ct. at 2743, 92 L.Ed.2d at 13-14.

Similarly, if the presumption that transcripts will be released is to be effective, once the press files a motion for disclosure, it must be given a meaningful opportunity to be heard before any contrary decision is made. *See e.g., In re Washington Post Co.*, 807 F.2d 383 (4th Cir.

1986). Pursuant to *Press II*, if the judge denies post-trial disclosure of the requested transcript, he must make specific, on-the-record factfindings demonstrating a substantial probability that higher values will be prejudiced and that reasonable alternatives cannot adequately protect those values.

We do not, however, imply that the court must hold a hearing and write redundant findings of fact that merely reiterate truisms. *See Harrelson*, 713 F.2d at 1117 (that the court held no unnecessary hearing to establish that the press is "tenacious in pursuing information" did not render invalid the order restricting press interviews of jurors). For example, as discussed below, the redaction of jurors' names in the circumstances presented here was justified; the court's excision of portions of the record comprising bench or *in camera* conferences is within its discretion and need not be the subject of a hearing. *See Gurney*, 558 F.2d at 1210 ("Such conferences are an integral part of the internal management of trial and screening them from access by the press is well within a trial judge's broad discretion.) The unredacted transcripts are, of course, subject to this Court's appellate review.

Redaction of Transcripts

The *Press I* Court instructed that redaction of juror names or portions of the transcript may constitute a reasonable alternative to safeguard jurors from unwarranted embarrassment and yet preserve the competing interests served by disclosure.[7] Times-Picayune notes

[7] The Court stated, in pertinent part:

"When limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time," if the judge determines that disclosure can be accomplished while safeguarding the jurors' valid privacy interests. Even then, a valid privacy

that in *Press I* the Court was concerned with the potential embarrassment to jurors that would stem from public discussion of highly personal attitudes, and perhaps experiences, concerning sex and rape. The jurors here expressed discomfort about betraying confidences shared with them by other jurors. Times-Picayune argues that this "minor discomfort" of jurors does not warrant the level of solicitude afforded the jurors in *Press I*. Thus, they assert, the permanent redaction of the jurors's names in the transcripts was error.

We disagree. The usefulness of releasing jurors' names appears to us highly questionable. The transcripts will reveal the substance and significance of the issues. Had the jury deliberations resulted in conviction, the issue of juror bias would inevitably have been appealed, with the unexpurgated transcript available as a matter of record. Had the government seriously suspected that a particular juror had been compromised, and had those suspicions been substantiated, collateral proceedings subject to the full gamut of first amendment challenges would follow. In *Gurney*, 558 F.2d 1202 (5th Cir.1977), we held that the trial judge's refusal to release the names and addresses of jurors violated no first amendment right of access. Our Court has recognized that, although post-trial restrictions on news gathering must be narrowly tailored, the jurors are entitled to privacy and protection from harassment even after completing their duties. *In re Express News*, 695 F.2d 807 (5th Cir. 1982). In *Harrelson*, 713 F.2d 1114 (5th Cir. 1983), the press raised a first amendment challenge to the court's post-trial motion that prohibited the press from making repeated interview requests once a juror has refused, and

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right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment."

Press I, 464 U.S. at 512, 104 S.Ct. at 825.

from inquiring into a specific vote by a juror other than the juror being interviewed. We find no intervening decisions by the Supreme Court that overrule these cases. Moreover, Times-Picayune raises no issue concerning post-trial restrictions on its ability to interview jurors after the trial. We find no error in the court's refusal to release jurors' names in the transcript.[8]

AFFIRMED.

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[8] We have reviewed the full transcript of the closed proceedings and conclude that the excised portions are within the gamut of issues discussed in bench conferences. We find no error in the court's redaction of the transcripts.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3298

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants,

versus

TIMES-PICAYUNE PUBLISHING CORP.,
GANNETT NEW SERVICES, INC., *et al.*,
Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

[Filed May 9, 1986]

Before WILLIAMS, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' emergency motion for expedited appeal is DENIED.

IT IS FURTHER ORDERED that appellants' alternative emergency petition for writ of mandamus and prohibition is DENIED.

The Court has reviewed the district court's challenged orders and the sealed transcripts of the in-chambers proceedings concerning reports of comments assertedly made by one or more jurors. We are informed that the case was submitted to the jury on May 8, but so far as we are aware a verdict has not been returned and the jury has not been discharged. On the basis of the material presently before us, we are unable to now conclude that the district court erred or abused its discretion in excluding the public from the in-chambers proceedings, or in sealing them or ordering court personnel not to publicly comment concerning them. This ruling is made without prejudice to any further review (or relief by motion) on more complete briefing and a possibly fuller record affording more of the entire trial context. This ruling also does not address unsealing the transcripts, and removing the ban on court personnel public comment, at the conclusion of the trial; such matters should be addressed in the first instance by the district court at that time, and if the court then declines to unseal the transcripts, or lift the ban on comment, adequately specific reasons should be given.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: E (1)

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed Apr. 17, 1986, 2:35 p.m.]

ORDER

There was a delay in the proceedings this morning. Basically, I received a report this morning from one of the Deputy Marshals that a juror had discussed some aspect of the previous trial with another juror. I and a representative of the Government and of the defendants questioned each juror individually regarding this incident. Motions to excuse two of the jurors were made. The motions were denied.

Although this jury is sequestered, there is a possibility, however slight, that specifics regarding the incident and the motions may reach the jurors. There has already been an instance in which the Marshals mistakenly did not delete a small newspaper article about this case from the newspaper before allowing the jurors to read it. Although that particular incident was harmless, I do not wish to risk the possibility of specifics of this matter reaching the jury.

Out of an abundance of caution, in order to preserve the impartiality and fairness of the jury,

IT IS ORDERED that the record of this matter be sealed;

IT IS FURTHER ORDERED that all counsel, parties, and court personnel are not to discuss this matter publicly. Members of the news media may object to this verbally on the record or in writing within 5 days. They may do so verbally at this time or in writing.

Thank you.

New Orleans, Louisiana, April 17, 1986.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: E (1)

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed Apr. 22, 1986, 1:03 p.m.]

ORDER

This morning the Court received a report from the Marshal regarding the jury. One juror relayed an incident in which a fellow juror commented about the actions of one of the defendants in the courtroom. Both of the jurors were briefly questioned by the Court and by counsel. Motions were made to excuse the two jurors involved which were denied. The Court finds that the comments of the one juror were of a joking nature and were not serious.

The importance of maintaining a fair and impartial jury in this matter is paramount. The consequences of the news of these motions and the identity of the parties making them reaching the jurors would be devastating to all parties' rights to a fair trial. The jurors are allowed visits with and telephone calls from family and friends, are allowed to watch censored television reports and cen-

sored newspapers. While I would like to think that the Marshal's office operates in a perfect manner and that no mistakes are ever made, the margin for human error is there and has already been demonstrated. In addition, in a few instances I have had to allow jurors to attend to certain crucial personal matters, such as dental attention and a wake of a family member, under the supervision of a Deputy Marshal, outside of sequestration. The jurors are also taken out to restaurants a couple of times per week. These actions are necessary in order to meet the needs of the jurors in terms of convenience and well-being. The jurors cannot be kept locked up for 6 to 8 weeks, 7 days per week, 24 hours per day, with no relief for personal matters or relaxation. This bears directly on the rights of the jury and the right of all parties to a fair trial.

All critical stages of this proceeding have been conducted in open court. The rights of the public and the press to an open trial have been protected by the Court. Convenient access by the press to the proceedings has been assured by the Court by way of the many procedures employed to accommodate them.

The Court is fully cognizant of the First Amendment rights of access of the press and public to the court proceeding. The Court is also aware of the right of the defendants and of the government to a fair and impartial jury. Because of the potential consequences of the specifics of this matter reaching the jury, and the possibility that this might occur given the circumstances surrounding sequestration, and in order to preserve the impartiality of the jury and the attendant rights of the parties thereto,

IT IS ORDERED that the transcript of the procedure involving the jury this morning be placed under seal and that counsel, the parties and the Court personnel refrain

from making any public statements whatever regarding this matter.

New Orleans, Louisiana, April 22, 1986.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States
District Judge

APPENDIX E

MINUTE ENTRY
LIVAUDAIS, J.
May 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-0078
Section: "E" /1

UNITED STATES OF AMERICA

versus

EDWIN W. EDWARDS, *et al.*

[Filed May 30, 1986]

RULING ON MOTION

The motion of the Times-Picayune Publishing Corporation, Gannett News Service, Inc., Capital City Press, John Marvin Hill, Mark Schleifstein, Bridget O'Brian, and Linda Lightfoot to remove the sealing of the transcripts and to remove the prohibition on public comment relating to the in chambers proceedings occurring April 17, 1986 and April 22, 1986 was submitted on a prior date. The trial was conducted on May 10, 1986, the jury having returned a verdict and the court ordering entry of judgment in accordance therewith on that date. Former defendants, Edwin W. Edwards, Ronald F. Falgout, James J. Wyllie, Jr., Marion D. Edwards, and Gus Mijalis all oppose the granting of the motion by written objections filed on their behalf by Ronald F. Falgout. Marion D.

Edwards filed a separate opposition. The United States opposes by written memorandum the defendants' continued opposition to the unsealing of the transcript.

The First Amendment rights of the press and the public, including the right to have a public trial, weigh heavily in the Court's consideration of the motion. The privacy interests of the jurors also weigh in this determination. As stated in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 824 (1984), "the presumption of openness [of a criminal trial] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." The trial court in *Press Enterprise Co.*, closed six weeks of the initial voir dire examination of prospective jurors, while allowing only three days to be open to the public. The Supreme Court reversed, holding "not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected." 104 S.Ct. at 826.

Bearing this test and these guidelines in mind, the Court now considers the motion to unseal the transcripts of the in chambers proceedings held on April 17 and April 22, 1986. Both of the proceedings were of a similar nature and were initiated by an incident report by one of the Deputy marshals that a juror reported that another juror made some comment to him or her about the trial being conducted or a previous trial. The two jurors who initially made the two reports both expressed the feeling that they were betraying the confidence of the other jurors and that they felt bad about doing that. The

Court previously instructed the jurors once they were impanelled that any such remarks made to them regardless of who made them must be reported to the Court immediately and that failing to do so would be considered a violation of the Court's instructions. Despite the fact that they were so advised, the jurors in question exhibited embarrassment, reluctance, and intimidation in having to report to the Court and in being questioned about remarks made by fellow jurors, with whom they were continually sequestered for approximately six weeks. The constant reassurances by the Court and counsel present that they were not in trouble, that they did the right thing, and that no harm would come to the other juror were made did not assuage the embarrassment and intimidation displayed by the juror in being questioned about the incident. It should be further noted that the Court purposely made the proceeding informal in order to ease the discomfort of the juror and to encourage candor. The prevailing atmosphere was quite different from the full voir dire each juror was subjected to in open court which lasted two weeks.

Following the questioning of the two jurors principally involved in each incident, the Court and counsel engaged in an informal discussion regarding what the procedure should be which consumed the majority of the proceeding. As all present were still in chambers, this portion of the proceeding was no more than a bench conference which is normally on the record and not considered a part of the trial subject to the openness requirement, as counsel speak informally, out of turn, and engage in a conversation with each other and the Court about procedural matters. No questioning was done nor any motions made during this phase.

A third portion of the April 17, 1986 proceedings involved questioning each juror about whether or not the remarks were made to him or her and if that person believed the remarks to be true. The remaining jurors

exhibited the same sort of reluctance and intimidation as the other jurors had and every effort was made to keep the tone as informal as possible in order to ease their embarrassment. There was additional informal conversation between counsel and the Court, followed by motions to excuse two jurors in each incident, and finally the denial of these motions.

All former defendants have objected to the unsealing of any portion of the transcript. Before resorting to this action at this stage of the proceeding, the Court must consider alternatives to closure and to total suppression in accordance with the *Press-Enterprise Co.* decision. The Court finds that a less restrictive alternative to complete closure is to seal only those portions of the transcript which are necessary to preserve the anonymity of the jurors, as well as comments made by counsel which are not part of the argument on the motions to excuse, deal with procedural matters, or which are unnecessarily embarrassing to the jurors involved as it was part of an informal conversation and not part of the proceeding at hand. The Court finds that the identities of the jurors and informal comments made by counsel about the credibility of particular jurors is unnecessarily embarrassing to these jurors, who were summoned to serve and served their civic duty, are now back in their communities and who have been subject to intense publicity through no voluntary action of their own.

The ban on public comments by court personnel, by counsel, and by the parties should be lifted, except in the specifics outlined above.

Based on the foregoing,

IT IS ORDERED that the motion to unseal the transcript and to lift the ban on public comment is GRANTED IN PART. The Court Reporter is hereby DIRECTED to make certain specific deletions in the transcript in accordance herewith.

IT IS FURTHER ORDERED that the motion to unseal the transcript and to lift the ban on public comment is DENIED IN PART as outlined in the Court's reasons expressed *supra*.

/s/ Marcel Livaudais, Jr.

Copy to:

(1) All Counsel of Record

(2) Court Reporter—
Mr. Joseph C. Catalano

(3) Jack M. Weiss, Esquire
400 Poydras Street
30th Fl., Texaco Center
New Orleans, LA. 70130-3195

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-3298 and 86-3495

D.C. Docket No. CR-85-078-E

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

versus

TIMES-PICAYUNE PUBLISHING CORP., and
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

[Filed July 31, 1987]

Before WRIGHT*, GEE, and JOLLY, Circuit Judges.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that movants-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 31, 1987

Issued as Mandate: Sept. 25, 1987

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-3298 and 86-3495

UNITED STATES OF AMERICA,
Plaintiff,

versus

EDWIN W. EDWARDS, *et al.*,
Defendants-Appellees,

versus

TIMES-PICAYUNE PUBLISHING CORP.,
GANNETT NEWS SERVICES, INC., *et al.*,
Movants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 7/31/87, 5 Cir., 198-, —— F.2d ——)

[August 31, 1987]

Before WRIGHT,* GEE and JOLLY, Circuit Judges.

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* Circuit Judge of the Ninth Circuit, sitting by designation.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee, Jr.,
United States Circuit Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Criminal Action No. 85-078
Section E

UNITED STATES OF AMERICA,
Plaintiff

v

EDWIN W. EDWARDS, *et al.*,
Defendants

[Received Apr. 17, 1986, 1:15 p.m.]

OBJECTION TO CLOSURE OF COURTROOM AND/OR TO SEALING OF RECORD

NOW INTO COURT, through undersigned counsel, come John Marvin Hill, Gannett News Service, Inc., Bridget O'Brien, Mark Schliefstein, and the Times-Picayune Publishing Corporation, Linda Lightfoot and Capital City Press and object to the closed proceedings being conducted in this important criminal trial and to the sealing of the record thereof on the ground that no justification exists or has been shown for such action; no findings have been made to support such action; no hearing upon adequate notice has been held to consider such action, all in violation of rights of the press and public as guaranteed by the United States Constitution, the 1974 Louisiana Constitution, and other applicable law, including *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980) and the authorities cited therein.

Respectfully submitted,

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No. 87-872

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

THE TIMES-PICAYUNE PUBLISHING CORPORATION, GANNETT NEWS SERVICE, INC., CAPITAL CITY PRESS, JOHN MARVIN HILL, MARK SCHLEIFSTEIN, BRIDGET O'BRIAN, AND LINDA LIGHTFOOT,

Petitioners,

v.

EDWIN W. EDWARDS, MARION EDWARDS, GUS MIJALIS, JAMES J. WYLLIE, JR., AND RONALD F. FALGOUT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the First Amendment prohibits a trial judge in the midst of a highly publicized criminal proceeding from interviewing jurors in chambers concerning possible juror improprieties without affording representatives of the press prior notice and an opportunity to be heard as to whether they should be permitted to attend.

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v.

EDWIN W. EDWARDS, MARION EDWARDS, GUS MIJALIS, JAMES J. WYLLIE, JR., AND RONALD F. FALGOUT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-19a) is reported at 823 F.2d

111. The three orders of the District Court (Pet.App. 22a-31a) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1987. On August 31, 1987, the same court denied a timely petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT

On February 28, 1985, a federal grand jury indicted the Governor of Louisiana, Edwin Edwards, and six other individuals for alleged violations of the federal racketeering mail and wire fraud statutes. When the trial began in September, 1985, the jury was not sequestered. All trial participants were, however, under a court order prohibiting them from discussing the case publicly (Order, United States District Court, March 8, 1985). On

December 18, 1985, after three months of trial, the jury reported it was unable to reach a unanimous decision on any of the counts relating to Edwards and four other defendants. The Court accordingly declared a mistrial (Pet.App. 2a).

The government chose to retry the defendants and moved to have the jury in the second trial sequestered. Such a drastic course was, in its view, necessary to "protect[] [the jury] from all bias from outside influences" during the course of the trial. Over defense objection, the trial court granted the government's request. 1/ The retrial began March 24,

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1/ In its response to the defendants' Opposition, the government offered several additional justifications for sequestration. It noted that during the first trial, "one of the defense counsel stated that he had received information that a juror's vote could be bought for $25,000. The source of this information indicated he was 'joking' when approached. Since there was no way to dispute this claim, the investigation was dropped." In addition on December 12, (cont'd.)

1986, with the jurors housed in a hotel in the custody of the U.S. Marshal.

1. The First Conference Concerning A Juror

On not one but two occasions during the retrial, the District Court was presented with reports by jurors to the Marshal of comments by other jurors indicating possible improprieties. On April 17, 1986, a marshal reported that one juror had told him that another juror on the panel had remarked that "the last jury got paid for voting acquittal" (Pet.App. 3a). The Court and counsel conferred on record in chambers about how best to handle the matter (Pet.App. 3a). In an effort to avoid intimidating jurors, the Court, the prosecutor and two repre-

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1985, the FBI had received an anonymous letter which alleged that "at least one maybe two of the jurors in the Governor's case ha[d] been compromised." Investigation of these reports failed to substantiate either of the allegations.

sentatives of counsel for the five defendants were the only ones present in chambers when questioning the jurors involved regarding the incident (Pet.App. 3a). No defendants were present. The juror who had allegedly made the remark denied the truth of the report, indicating that whatever he had said had simply been misconstrued. (Pet.App. 3a). In an effort to satisfy himself that such remarks had not been made to other jurors on the panel, the prosecutor suggested that the court question each individually (R.E. 90). 2/ At the end of this questioning,

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2/ When defense counsel requested that counsel for all five defendants be present during the remaining interviews, however, the prosecutor raised the possibility that the proceedings be held in open court (Pet.App. 3a). The government renewed this statement when one defense attorney suggested "[w]e [could] try to get in the back" of the room (R.E. 95). When defense counsel agreed to continue the proceedings in the same manner (R.E. 95), no further suggestions that "the proceedings be conducted in open court" (Pet. at 4) were heard from the government.

which consumed approximately two hours in the course of what would become a six-week trial, motions to excuse the juror were discussed and then denied (Pet.App. 3a).

That afternoon, after media representatives had filed an objection to the conduct of the proceedings (Pet.App. 3a), the District Court outlined the rationale behind its recently filed order sealing the record of that morning's events and ordering all participants not to discuss the matter publicly (Pet.App. 22a):

> Although this jury is sequestered, there is a possibility, however slight, that specifics regarding the incident and the motions may reach the jurors. There has already been an instance which the Marshals mistakenly did not delete a small newspaper article about this case from the newspaper before allowing the jurors to read it. Although that particular incident was harmless, I do not wish to risk the possibility of specifics of this matter reaching the jury.

On April 21, 1986, the petitioners filed a Notice of Appeal from the District

Court's Order. With that notice, the petitioners also moved to take an emergency appeal (Pet.App. 4a n.2), contending that their First Amendment rights had been violated.

2. The Second Conference Concerning a Juror

Several days later, the District Court was again informed by a deputy marshal of a report suggesting irregularities on the part of the jury (Pet.App. 3a-4a). According to the report, one juror had told another juror that each time the jury was dismissed, one of the defendants would smile at him and display an envelope (Pet.App. 3a-4a). The first juror had stated to the other juror that he could not help the defendant for less than $5,000 (Pet.App. 4a).

The District Court summoned counsel to chambers and proceeded to question the two jurors involved. 3/ Although both

were initially reticent in speaking about the statement (R.E. 131; 138-139), the repeated assurances of both the court and counsel that he was "not in any trouble" served to encourage the first juror to admit that he had merely been joking (R.E. 138-139). Again, motions to excuse the juror in question were discussed and then denied (R.E. 154).

Early that afternoon, the Court issued an order so that the public would be apprised, to the extent necessary, of that morning's proceeding (Pet.App. 4a). The transcript, however was to remain sealed because of the "possibility of specifics reaching the jury" (Pet.App. 4a). In the Court's view, the potential consequences of that precise possibility "would be devastating to all parties'

3/ Even though all counsel were present at this point, no suggestion was heard from the government that the proceedings be held in open court.

rights to a fair trial." (Pet.App. 24a). While noting that "[a]ll critical stages of this proceeding have been conducted in open court" (Pet.App. 25a), the "impartiality of the jury and the attendant rights of the parties" required the sealing of that morning's conference and a ban on public comment concerning it (Pet.App. 25a).

Following the District Court's order, the petitioners supplemented their earlier filings in the Court of Appeals to challenge the trial court's management of the second in-chambers inquiry. On May 9, 1986, a panel of the Fifth Circuit unanimously rejected the petitioners' Motion for Emergency Appeal. Based on the record before it, which included the full transcript of the challenged proceedings, the panel was, at that time, "unable to . . . conclude that the district court erred or abused its discretion in excluding the

public from the in-chambers proceedings" or in thereafter sealing the transcripts and imposing a ban on public comment (Pet.App. 21a). The ruling did not address the eventual unsealing of the transcripts after trial; the court specifically noted that such matters should be addressed to the district court in the first instance (Pet.App. 21a). The following day, the jury returned a verdict of not guilty as to all defendants.

3. The District Court Unseals The Transcripts

Following the Court of Appeal's denial of the petitioners' emergency appeal and the verdict of the jury, the District Court issued a final order affording the petitioners substantially all the relief they sought. Noting that the rights of the press and the public to the transcripts "weigh[ed] heavily" in his decision now that trial had ended

(Pet.App. 28a), the Court released redacted transcripts from which it had eliminated the names of the jurors, portions of the transcript that included "comments made by counsel which are not part of the arguments on the motions to excuse" and which dealt with either "procedural matters" or the credibility of particular jurors. The Court then lifted the prohibitions on public comment, except as to those matters remaining under seal. 4/

4/ The petitioners' claim that the transcripts may contain "contemporaneous comments . . . on the propriety of holding closed proceedings over the objections of the petitioners" (Pet. 7) is sheer speculation. The full sealed transcript was made available to the court of appeals, which "reviewed the full transcript of the closed proceedings and conclude[d] that the excised portions [were] within the gamut of issues discussed in bench conferences." (Pet.App. 18a).

4. The Decision of The Court of Appeals

On appeal from this order by the petitioners, the Court of Appeals unanimously affirmed. Relying on its decisions in United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983) and United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977) as well as this Court's pronouncements in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and its progeny, the Court of Appeals observed that the conduct of midtrial proceedings involving the questioning of jurors enjoyed a long tradition of closure (Pet.App. 10a). And, as with bench conferences, the protection of their privacy was "subject to the broad discretion of the trial court" (Pet.App. 10a-11a). Accordingly, it rejected the petitioner's contention that such proceedings should simply be viewed as "supplemental voir dire," emphasizing that the process of

ferreting out possible juror improprieties was "different in several respects from the other types of proceedings found by the [Supreme Court] to be presumptively open -- differences not of degree, but of kind" (Pet.App. 11a; footnote omitted):

> Wrenched from their neutral posture, the jurors themselves are suddenly cast on the defensive, facing counsel who are now their cross-examiners, a most difficult situation for all. During voir dire of potential jurors, counsel is armed both with challenges for cause and with peremptory challenges; counsel can probe to elicit indications of bias. Here, the jury, with a limited number of alternates is fixed.

The opinion further explained why conducting this proceeding in open court would be especially upsetting to the jurors and disruptive of the trial (Pet.App. 11a-12a):

> This process itself can create undesirable bias against the defendants whom counsel represent. The deleterious effects can only be exacerbated by requiring jurors to "defend" themselves in open court. As

> the process takes on an adversarial nature, counsel will likely demand recusals, even of those jurors whom they believe were not biased before the proceeding.

Far from advancing any "significant positive role" at trial, forcing a court to hold the questioning of impaneled jurors in open court could bring with it a "substantial probability" that what may have begun as a "tempest in a teapot" in the case before it "will end in a mistrial, a hung jury, or a reversal on appeal" (Pet.App. 12a). Thus, the "interest in preserving the jury as an impartial, functioning, deliberative body is not only a higher value than that served by openness here, it is a sine qua non of our system of criminal justice" (Pet.App. 12a). Accordingly, no right of access attached to the proceedings, and the District Court did not err in failing to provide a preclosure hearing (Pet.App. 12a). 5/

REASONS FOR DENYING THE WRIT

In the course of a lengthy, highly publicized criminal trial, judges are frequently presented with reports by jurors themselves, or by the parties, or by third persons suggesting that a juror may have violated a rule, been exposed to extraneous influences, made improper remarks to others concerning the trial, or engaged in some other questionable conduct. This is particularly true where, as in this case, the jurors are sequestered, and spend all their time in the company of each other and the U.S. Marshals. These reports require inquiry by the Court, but

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5/ The Court also upheld the the district court's post-trial issuance of redacted transcripts of those proceedings on the basis that, despite sequestration, "mid-trial publicity does continue to threaten the impartiality of the jurors" (Pet.App. 15a). Moreover, the limited excisions ultimately made by the trial court were both "justified" and "within its discretion" (Pet.App. 17a).

upon inquiry, are usually found to be of no consequence to the trial.

The principle the petitioners seek to establish in this case would require a trial judge either to question jurors concerning these reports in open court or -- before making any such inquiry -- to conduct an adversary hearing at which the position of the news media is solicited as to whether the inquiry may be held at the bench or in chambers. Such a principle would seriously limit the ability of trial judges to deal with matters affecting individual jurors quickly, informally and with minimum risk of disrupting the trial. No court has ever suggested that such a principle is required by the First Amendment, and the court of appeals in this case properly rejected the petitioners' argument. Review by this Court is unwarranted.

In deciding whether the public has a First Amendment right of access to a particular proceeding, both this Court and others have looked to two considerations: historical practice and public policy. See Press-Enterprise Co. v. Superior Court, ____ U.S. ____, 106 S.Ct. 2735, 2740-41 (1986); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-73 (1980). "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." Press-Enterprise Co., supra, 106 S.Ct. at 2741. Thus, as then-Judge Scalia observed, "a historical tradition of at least some duration" which would "play 'an essential role' in the proper functioning of government" is "obviously necessary" before a constitutional requirement of access can be imposed. In re Reporters Committee for Freedom of the Press, 773

F.2d 1325, 1332 (D.C. Cir. 1985). In the absence of both considerations -- as the Court of Appeals concluded here -- neither a right of public access nor a right to a hearing on the closure issue exists. 6/

1. The Court of Appeals correctly found that a trial judge's management of matters involving possible jury misconduct, including decisions as to whether a proceeding should be held in open court, at the bench or in chambers, has "historically been subject to the broad discretion of the trial court." (Pet.App. 11a).

6/ Having found no First Amendment right of access to the juror interviews at issue, the Court of Appeals did not have to reach the issue of whether the District Court erred in failing to afford the petitioners a prior opportunity to be heard in opposition to the in camera conferences. Nonetheless, the court stated that due to the "precipitious" presentation of both reports and the nature of the proceedings that ensued, it saw "no need" for the court to halt the proceedings "to provide a midcourse discussion of reasonable alternatives to closure" (Pet.App. 13a, n.5).

That such proceedings are customarily handled out of the presence of the press and public, whenever the questioning might subject a juror to any anguish or embarrassment or threaten to disrupt the proceeding, is well known to experienced trial judges and counsel in criminal cases, and is illustrated by United States v. Jones, 542 F.2d 186, 195 (4th Cir.), cert. denied, 426 U.S. 922 (1976) (when an issue of juror misconduct arises, a trial court should privately interrogate them, on the record, and in the presence of counsel); United States v. Crisona, 416 F.2d 107, 119 (2d Cir. 1969), cert. denied, 397 U.S. 961 (1970) (in chambers inquiry of jurors "reasonable under the circumstances"); United States v. Musto, 540 F.Supp. 318 (D.N.J. 1982) (voir dire examination of juror held in chambers with counsel present); cf. United States v. Woodner, 317 F.2d 649 (2d Cir.),

cert. denied, 375 U.S. 903 (1963). As the Eighth Circuit acknowledged in United States v. Rizzo, 304 F.2d 810, 816 (8th Cir.), cert. denied sub nom. Nafie v. United States, 371 U.S. 890 (1962), such an examination of jurors

> presents a very delicate and troublesome situation. There is then the present possibility of punishment for misconduct. The trial then being under way, the situation is fraught with grave possibilities in the matter of mistrial.

Because "[a] district court has broad, though not unlimited, discretion to determine the extent and nature of its inquiry into allegations of juror bias" (see United States v. Corbin, 590 F.2d 398, 400 (1st Cir. 1979)), it need not hold hearings or make fact-findings to support its orders in such matters. United States v. Harrelson, supra, 713 F.2d at 1117. Accord, Gurney, supra, 558 F.2d at 1211 n. 15; United States v. Anderson, 799 F.2d 1438, 1441 n.3 (11th

Cir. 1986). "This is especially true of widely publicized or sensational cases." Id. As the court in Harrelson reaffirmed, "[a] federal judge is not the mere moderator of a jury trial; he is its governor for the purpose of insuring its proper conduct." Id.

2. The decision of the Court of Appeals does not represent a departure from the recent precedents of this Court. While having no occasion to address this precise issue, this Court has been careful to distinguish such in-chamber inquiries from "trial proceedings" to which the right of access attaches. Justice Brennan, concurring in the judgment in Richmond Newspapers, supra, was careful to note (448 U.S. at 598 n.23 (Brennan, J. joined by Marshall, J. concurring)):

> [W]hen engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the

> huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.

The Court in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982), cited with approval Justice Brennan's comments, referring to "the traditional authority of trial judges to conduct in camera conferences." 7/

7/ This Court has recognized that even a defendant does not possess a constitutional right to attend in camera discussions which occur between a court, counsel, and jurors (United States v. Gagnon, 470 U.S. 522, 527 (1985)):

> The encounter between the judge, the juror, and [the defendant's] lawyer was a short interlude in a complex trial; the conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment.

Accord, Rushen v. Spain, 464 U.S. 114, 125-126 (1983) (Stevens, J., concurring) ("[T]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of (cont'd.)

3. The Court of Appeals did not, as the petitioners contend, create an entire "class of proceedings outside the First Amendment right of access" (Pet. 13). Indeed, the Court went to great lengths to emphasize that, under circumstances not before it, the First Amendment "might require that proceedings involving the questioning of jurors be held in open court" (Pet.App. 13a, n.5). Because the need for private questioning of the jurors in this case was so obvious, and the "practical difficulties of holding a hearing" (Pet.App. 13a, n.5) were so apparent, the Court did not need in this case to delineate the circumstances under

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any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.")

which a different resolution might be required. 8/

4. By holding that the First Amendment served as no bar to the District Court's actions, the Court of Appeals simply recognized that the right of the press to publish may not destroy the right to a fair trial. Accord, Mares v. United States, 383 F.2d 805, 809 (10th Cir. 1967). The Sixth Amendment provides that the criminally accused have a right to a panel of impartial jurors. Moreover, this right is a continuing one, assuring a

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8/ Nor does the Court's rationale carry with it a "potentially broad applicability in the future to other mid-trial proceedings" (Pet. 22) such as motions to exclude evidence. In Rovinsky v. McKaskle, 722 F.2d 197 (5th Cir. 1984), the Fifth Circuit reversed a defendant's conviction on the basis of the trial court's mid-trial closure of a hearing on a motion to limit a witness' cross-examination -- a matter bearing directly on his testimony at trial. As the Fifth Circuit emphasized, the right to a public trial extends to those proceedings which are "an integral part of the trial," such as motions to suppress evidence. 722 F.2d at 201.

defendant a jury unprejudiced by extraneous influence throughout the trial. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); United States v. Barshov, 733 F.2d 842 (11th Cir. 1984) cert. denied, 469 U.S. 1158 (1985). It is the court's responsibility to take all necessary steps to ensure that juror impartiality is maintained at all times. See e.g. Remmer v. United States, 347 U.S. 227, 229 (1954) (any private communication, contact, or tampering with juror during criminal trial not made according to court instruction presumptively prejudicial). 9/ While access to those proceedings traditionally open may serve

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9/ Accord, Chandler v. Florida, 449 U.S. 560, 574 (1981) (dictum) (any highly publicized criminal trial presents risk of compromising defendant's right to a fair trial); United States v. Williams, 568 F.2d 464 (5th Cir. 1978) (prejudice may be presumed in certain egregious "media circus" situations).

to "guard against arbitrary, overreaching, or even corrupt action by participants in judicial proceedings" (Pet.App. 15-16a), the in-chambers inquiry -- and the later release of their transcripts -- served merely to ensure the "paramount interest in maintaining an impartial jury" (Pet.App. 16a).

5. Finally, even if the broad constitutional issue the petitioners seek to present were worthy of this Court's consideration, this case is a peculiarly unsuitable vehicle. The trial judge did not conduct a "secret" proceeding, and was at every stage sensitive to the interests of the news media as well as the interests of the individual jurors and the defendants. At the conclusion of each proceeding in chambers, he described in open court the nature and result of the proceeding (Pet.App. 22a, 24a.) At the close of the trial, he released tran-

scripts of the proceedings with only minor redactions designed to protect the identity of the particular jurors involved and to eliminate counsel's comments made about the credibility of particular jurors. (Pet.App. 30a.) The petitioners do not contend in this Court that any information has been withheld to which they are constitutionally entitled. The trial ended almost two years ago, with acquittal of all defendants, and no relief could be granted to the petitioners even if this Court were to adopt the sweeping constitutional principle they seek to establish. Since the decision below is not in conflict with decisions of any other Circuits, there is simply no good reason for review of the matter by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, THE NATIONAL ASSOCIATION OF BROADCASTERS, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-872

THE TIMES-PICAYUNE PUBLISHING CORP., ET AL.,
Petitioners,

v.

EDWIN W. EDWARDS, ET AL.,
Respondents.

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, THE NATIONAL ASSOCIATION OF BROADCASTERS, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTERESTS OF AMICI CURIAE

The news organizations filing this brief have a vital interest in the outcome of this case. If the decision below is allowed to stand, the news media's ability to gather the news will be

severely impaired. Under the Fifth Circuit's decision, proceedings involving juror corruption in criminal trials will be presumptively closed even in cases of vital public interest, and the amici will generally be denied any reasonable opportunity even to find out that such proceedings occurred until well after the trials are completed.[1/]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every Supreme Court case involving the First Amendment rights

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1/ This amicus brief is being filed with the consent of all parties. See Letter of William Jeffress, Jr.; Letter of Jack Weiss; Letter of Michael Fawer.

of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-for-Profit Corporation Law of the State of New York. The Associated Press gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world.

The National Association of Broadcasters is a non-profit, incorporated association of more than 5,000 radio stations, 940 television stations, and the major commercial broadcast networks.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has over 2,500 members who gather, edit and disseminate news and other public affairs information carried by the national networks, local radio and television broadcast stations and cable television systems throughout the nation.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

By closing two mid-trial hearings concerning suspected jury tampering and misconduct during the criminal

racketeering trial of Louisiana's incumbent governor, the trial judge prevented the public and the news media from ascertaining, until weeks after the verdict, whether the jury was fair and impartial and whether the tampering and misconduct charges were properly investigated and resolved. The Court of Appeals affirmed, concluding that "for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors" (App. 12a) and that the First Amendment allows access to be automatically delayed until after trial and to be routinely limited to portions of the cold transcript.

The First Amendment, however, guarantees contemporaneous public scrutiny of criminal trials and thereby ensures their integrity and judicial accountability. As this Court has stated, "the knowledge that every criminal trial is

subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[2/] This value underlies the consistent holdings of this Court and the other Courts of Appeals that the right of access to criminal trial proceedings is vital to assure that such proceedings are conducted fairly in fact and appearance, that the public can "serve as a check upon the judicial process -- an essential

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2/ In re Oliver, 333 U.S. 257, 270 (1948) (emphasis added). See Bridges v. California, 314 U.S. 252, 268 (1941) ("public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968), quoting A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) ("It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two many be of crucial importance in some instances.").

component in our structure of self-government," and that adjudications are not based on secret bias or corruption.[3/]

Even the decision below acknowledges that "[t]he issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings." App. 10a. It recognizes that "[o]nce the spectre of a tainted jury is raised, public scrutiny of the resolution

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3/ Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980) (plurality opinion). Moreover, when their impartiality has been put at issue, jurors in the Fifth Circuit will now be questioned behind closed doors, without the incentive to truthfulness provided by public testimony. Contrary to the Fifth Circuit's speculation (App. 11a-12a), public proceedings are generally more likely to improve than to worsen the quality of testimony. Globe Newspaper, 457 U.S. at 610 n.26.

of the issue is essential, especially when, as here, the jury acquits." Id.

It is for precisely these reasons that "the presumption of access normally involves a right of contemporaneous access[.]"[4/] Contrary to the Fifth Circuit's approach, First Amendment freedom does not bear "an inverse ratio to the timeliness and importance of the ideas seeking expression."[5/] By its paradoxical holding that the First Amendment creates a presumption in favor of delayed but not contemporaneous access to hearings on

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4/ Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1310 (7th Cir. 1984) (emphasis in original). Continental Illinois involves a civil case, but its holding applies a fortiori to criminal trials. See also Associated Press v. United States District Court, 705 F.2d 1143, 1147 & n.3 (9th Cir. 1983) (holding unconstitutional a 48-hour delay in access to pretrial criminal hearing).

5/ Bridges v. California, 314 U.S. at 269.

juror misconduct, the decision below undermines these values and turns this Court's decisions on their head.

Abandoning the presumption of contemporaneous access, along with its requirement of a pre-closure notice and hearing, creates a presumption of closure and in fact guarantees closure as a practical matter. The decision below allows mid-trial proceedings concerning jury tampering and juror misconduct to be automatically closed without any justification, much less the constitutionally-required "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values[.]'"[6/]

6/ Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986) (citation omitted). Although it purported to preserve judicial discretion to decide whether probes of suspected juror misconduct ought to be public or secret (Footnote Continued)

Without reasonable notice of potential closure, the public and press are denied any effective opportunity to contest requests for secret proceedings. The lack of pre-closure notice and hearing creates a substantial risk that the public will not even suspect that the integrity of the jury has been questioned, or that it has been shut out of significant proceedings.7/

(Footnote Continued)

(App. 10a-11a), the Court of Appeals in effect decided that the trial court need not exercise any judgment at all before closing these proceedings. Neither precedent, empirical evidence, nor logic suggests that any compelling interests cannot be protected here, as in other trial proceedings, through closure on a case-by-case basis consistent with strict First Amendment standards.

7/ Here, the public was deprived any opportunity to learn of the existence of serious charges until after the trial ended with the jury's verdict of acquittal. Apparently deliberately, the district court's opaque descriptions of the sealed proceedings gave no hint about

(Footnote Continued)

To avoid these kinds of problems, "individualized determinations are always required before the right of access may be denied."[8/] To ensure a proper adjudication of the need for closure of criminal proceedings, six other Circuits have required not only a case-by-case determination but also reasonable notice of potential closure and a pre-closure hearing.[9/] The Fifth Circuit is the first to hold otherwise.

(Footnote Continued)

the gravity of the allegations explored at the secret hearing. See Order, United States v. Edwards, Criminal No. 85-0078 (E.D. La. April 17, 1986) (App. 22a); Order, United States v. Edwards, Criminal No. 85-0078 (E.D. La. April 22, 1986) (App. 24a).

8/ Globe Newspaper, 457 U.S. at 609 n.20 (emphasis in original and supplied); see id. at 609 n.25.

9/ In re Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); United States v. Raffoul, 826 F.2d 218, 226 (3rd Cir. 1987); United States v. Criden, 675 F.2d

(Footnote Continued)

In sum, using reasoning that could apply to a range of hearings regularly conducted during criminal trials, the Fifth Circuit has created an open-ended exemption from the First Amendment's requirement that substantive proceedings in criminal trials be closed, if at all, only after a case-by-case determination of the need for closure and after public notice and opportunity to be heard. This Court should review this fundamentally unsound decision in order to reassert the substantive and procedural protections

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(Footnote Continued)

550, 557-60 (3rd Cir. 1982); In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986); In re Knight Publishing Co., 743 F.2d 231, 234 (4th Cir. 1984); In re Iowa Freedom of Information Council, 724 F.2d 658, 661, 664 (8th Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1168 (9th Cir. 1982); Sacramento Bee v. United States District Court for the Eastern District of California, 656 F.2d 477, 482 (9th Cir. 1981), cert. denied 456 U.S. 983 (1982); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983).

embodied in the First Amendment right of contemporaneous access.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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I, Anthony C. Epstein, counsel of record for amici and a member of the Bar of this Court, hereby certify that three copies of Brief of Amici Curiae in Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were deposited in a mailbox, with first class postage prepaid, addressed to each of the following counsel for the parties:

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THE TIMES-PICAYUNE PUBLISHING CORPORATION, *et al.*,
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v.

EDWIN W. EDWARDS, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS

The petitioners submit this reply brief in support of their petition for a writ of certiorari. Although the respondents seek to minimize the importance of the decision below, their opposition memorandum focuses the broad implications of that decision and underscores the necessity for full review by this Court.

ARGUMENT

1. Like the Court of Appeals, the respondents seek to remove the issue presented here from the reach of this Court's prior access decisions. The respondents do so by recasting the two lengthy mid-trial proceedings at issue, which were prompted by reports of attempts to bribe a juror, as ordinary bench conferences. Thus, the respondents frame their counterstatement of the question as whether "the First Amendment prohibits a *trial judge* in the midst of a highly publicized criminal proceeding

from interviewing jurors in chambers. . . ." In fact, these "interviews" were on the record examinations of both jurors and non-juror witnesses; the "interviews" were conducted not only by the "judge" but also by counsel; during these "interviews" motions to excuse jurors were made and argued by counsel; and rulings on these "interviews" were made and the reasons for those rulings stated by the District Court. Each of the proceedings lasted over two hours.[1]

Taking their cue from the Court of Appeals, the respondents seek to fit the multi-faceted proceedings at issue here, which included testimony, motions, and rulings, within *dicta* in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (Brennan, J., concurring opinion) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n. 25 (1982), suggesting that sidebar "huddles" and similar routine *in camera* conferences are not subject to public access rights. There is, however, no hint in those brief *dicta* that the "bench conference" rubric extends to testimonial and adjudicative mid-trial proceedings, hours in duration, which go to the impartiality and fairness of the jury in a criminal trial. Far from supporting denial of certiorari, the elastic interpretation of the "bench conference" exception by the Court of Appeals (App. 8a-10a) itself presents an issue worthy of full review by this Court.

2. The Court of Appeals held that all mid-trial juror proceedings fall outside the constitutional presumption of openness. In support of this categorical conclusion, the Court of Appeals relied principally upon the prognostication that the public examination of impanelled jurors invariably leads to conflict and intimidation, while

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[1] Throughout their opposition, the respondents belittle the proceedings as "conference[s] concerning a juror" (Opposition, pp. 4, 7); "that morning's conference" (Opposition, p. 9); "juror interviews" (Opposition, p. 18 n.6); and "in-chamber inquiries" (Opposition, p. 21).

the same procedure conducted behind closed doors would not. (App. 11a-12a). This pronouncement is manifestly speculative. It is also directly contrary to this Court's conclusion that public presence tends to improve, not undermine, the quality of testimony. *Globe, supra,* 457 U.S. at 610 n. 26.

Categorical closure flies in the face of *Globe*'s common sense teaching that a trial court must weigh on a case-by-case basis even those compelling interests supporting closure in order to assure that closure will not be ordered unless it is both necessary and carefully circumscribed. "[A] mandatory rule, *requiring no particularized determinations in individual cases,* is unconstitutional." *Globe, supra,* 457 U.S. at 611 n.27 (emphasis added). The First Amendment does not allow a generalized rule of courtroom closure when "it is clear that the circumstances of the particular case may affect the significance of the interest [assertedly justifying closure]." *Globe, supra,* 457 U.S. at 608.[2]

The respondents make no effort to justify the categorical analysis of the Court of Appeals as conducive to proper determination of closure requests in specific cases. Rather, the respondents point to one footnote in the Court of Appeals opinion which purports to leave open the possibility that some future probe of suspected juror misconduct might be conducted in public. (Opposition, pp. 23-24, quoting App. 13a, n.5). Because "the need for private questioning of the jurors in this case was so ob-

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[2] In the context of mid-trial juror proceedings, the propriety of closure may depend upon such varying facts as whether the incident being investigated involves threats to a juror, illness of a juror, exposure to prejudicial publicity, juror misconduct, or outright attempts to bribe a juror; the nature and stage of the trial itself; the jurors' own expressions of discomfort or lack thereof; the anticipated length and structure of the inquiry to be conducted; the positions of prosecution and defense on the necessity for closure; and myriad other specific facts that inform any proper reconciliation of First Amendment interests and competing concerns.

vious, and the 'practical difficulties of holding a hearing' were so apparent," the respondents say, the Court of Appeals did not make any categorical pronouncement about closure of all mid-trial juror proceedings.

The single footnote upon which the respondents rely is, however, no match for the facts of the case. In this case, the interests in open proceedings were so compelling (informing the public about allegations of possible jury bribery in the criminal trial of an incumbent governor for acts of alleged public corruption); the interests in total closure so speculative (the jury was sequestered, the parties freely discussed all other aspects of the case, and the District Court found that there was only a "possibility, however slight" that the specifics of the closed proceedings would reach the sequestered jury); and the interest and availability of persons opposing closure so apparent (petitioners and their counsel were available immediately to address closure, and there is nothing in the record to support the Court of Appeals' assertion that "practical difficulties" precluded a pre-closure hearing) that the Fifth Circuit decision inevitably will be read as permitting closure of mid-trial juror proceedings without a pre-closure hearing in the unbridled discretion of the trial court.

The cited footnote, moreover, must be read against the Court of Appeals' statement of its own holding.[3] Unquestionably, that holding has the effect of removing *all* mid-trial juror proceedings from the procedural and substantive criteria for courtroom closure established by this Court's prior decisions. While the Court of Appeals' footnote theoretically may leave open the "possibility" that the First Amendment may preclude closure of juror proceedings on other facts, if the decision below stands

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[3] "Thus, for first amendment purposes, no presumption of openness attaches to proceedings involving the mid-trial questioning of jurors. It follows that the trial judge did not err in failing to provide a preclosure hearing." (App. 12a-13a).

that "possibility" will be addressed only within the framework of the Court of Appeals' holding that no presumption of openness attaches to juror proceedings and no prior opportunity to be heard need be extended to opponents of closure. The holding leaves trial judges free to close juror proceedings at will and plainly permits, if it does not require, closure of every such proceeding.

Accordingly, it is apparent that if the Court of Appeals were to address the propriety of closing juror proceedings in another case, it would evaluate closure only within a procedural and substantive constitutional framework radically different from that of *Richmond Newspapers*, *Globe*, and their progeny. The decision below squarely rejects the established constitutional framework of closure adjudication and applies a new, loosely discretionary closure regime—unknown to any prior decision of this Court—to *all* mid-trial juror proceedings. If not a categorical mandate for closure, this regime surely embodies a forthright rejection of the standards of adjudication articulated at length by this Court in its prior access cases. It merits full review by this Court.

3. Contrary to the respondents' contentions (Opposition, p. 18), this case squarely presents the issue whether the First Amendment permits a trial court to close mid-trial proceedings to inquire into possible bribery of the jury without affording those opposing closure an opportunity to be heard. The Court of Appeals expressly held that "for first amendment purposes, no presumption of openness attaches to proceedings involving the mid-trial questioning of jurors." The Court then added, unmistakably:

> It follows that the trial judge did not err in failing to provide a preclosure hearing.

(App. 12a-13a). The Court of Appeals reiterated the point in an accompanying footnote:

> In these circumstances, there is no need for the court to halt the proceedings to provide a midcourse discussion of reasonable alternatives to closure.

(App. 13a, n.5). There is, then, no basis for the respondents' suggestion that the Court of Appeals disposed of the case without confronting the issue of the petitioners' right to be heard in opposition to closure. Logically, the Court of Appeals could not, in any event, have affirmed the speculative "findings" supporting the District Court's closure orders without disposing of the petitioners' central contention that those "findings" had been reached without constitutionally required input from the petitioners.

4. As discussed at length in the Petition, pp. 15-17, the decision of the Court of Appeals converts this Court's functional test for determining whether there is a First Amendment right of access to a particular proceeding into a generalized balancing test for determining if entire categories of trial proceedings proceed more efficiently when open or closed. The decision below seriously misconstrues the functional test by weighing against the positive values of openness,[4] the proper functional standard identified by seven other circuits, inherently speculative and supposedly negative concerns about the impact of public access on the proceedings at issue (App. 11a-13a). Significantly, the respondents make no effort to justify this misconstruction of the functional access test, nor to reconcile the Fifth Circuit's novel balancing version of the functional test with that adopted in the First, Second, Third, Fourth, Sixth, Ninth, and Eleventh Circuits.

Instead, the respondents seek to avoid the functional test altogether. They contend that there is no historical

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[4] Whether "public access . . . would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." Petition, pp. 15-16, n.10.

tradition of public access to juror proceedings[5] and cite the view of then Judge Scalia that a historical record of openness is "obviously necessary" to a determination of constitutional access. Opposition, p. 17, *citing In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C. Cir. 1985). Although this Court considers both historical and functional factors in determining whether a presumption of openness applies, and a clear majority of this Court have concluded that a history of public access is helpful because "a tradition of accessibility implies a favorable judgment of experience," *Globe*, 457 U.S. at 605, *quoting Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment); *Richmond Newspapers*, 448 U.S. at 582-584 (Stevens, J., concurring), the Court has never held that a histori-

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[5] Despite the Fifth Circuit's unsupported assertion to the same effect, there is evidence indicating that juror inquiries historically have been open. *See* Petition, pp. 14-15. The handful of cases cited by respondents as illustrative of a tradition of closure arise under circumstances in which a defendant has failed to object to the conduct of proceedings in chambers and the Court has found that the defendant waived his right to object. *See, e.g., United States v. Crisona*, 416 F.2d 107 (2d Cir. 1969) (No indication in record that defense counsel requested hearing in open court or objected to proceedings in chambers. Thus, the Court found no merit to defendant's argument.); *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976), *cert. den.*, 426 U.S. 922 (1976) (Defendants cannot be heard to complain on appeal about *ex parte* questioning of juror by judge in chambers where Court merely adopted a procedure suggested by counsel for defendants.); *United States v. Musto*, 540 F. Supp. 318 (D.N.J. 1982) (Defendants waived right to object to *ex parte* questioning of juror by judge where counsel failed to object to procedure and, in fact, had approved of the procedure). Other cases indicate that juror inquiries are frequently conducted in open court (Petition, p. 14 n.8); and the only case besides the present one which, to our knowledge, addresses the First Amendment issue of access to juror proceedings recently recognized a constitutional right of access to such proceedings. *Detroit Free Press v. Recorder's Court Judge*, 14 Med. L. Rptr. 2044 (Mich. App., December 10, 1987).

cal record of openness is necessary before the First Amendment right of access attaches to proceedings. Thus even if the historical evidence did not support open juror proceeding, the Court of Appeals' misuse of the functional test as a vehicle for categorical closure analysis cannot be sidestepped or ignored.

5. The respondents suggest that this case is "peculiarly" unsuited for the granting of certiorari because the case does not have broad application. Yet the respondents themselves acknowledge that "judges are frequently presented with reports" of potential juror misconduct. (Opposition, p. 15). Moreover, both the Petition and the Opposition cite numerous decisions involving mid-trial inquiries concerning the jury.

Similarly, this Court should pay little heed to the respondents' suggestion that review is unwarranted because the Court cannot award meaningful relief to the petitioners. This suggestion is but a disguised argument that an access case is mooted by the unimpeded conclusion of secret proceedings, an argument repudiated long ago by this Court in the specific context of access issues. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. ——, 92 L.Ed.2d 1, 9, 106 S. Ct. 2735 (1986); *Globe, supra*, 457 U.S. at 603; *Gannett Co. v. De Pasquale*, 443 U.S. 368, 377-378 (1979).

In addition, to this day the petitioners are being deprived of access to material portions of the closed proceedings. Without any justification but a cursory footnote, (App. 19a, n. 8), the Court of Appeals affirmed the *permanent* sealing of portions of the District Court record that would include comments of the Court and the parties on the issue of closure. Thus the petitioners have been forced to present their case in the Court of Appeals and in this Court, to date, without access to critical portions of the contemporaneous record. The petitioners vigorously seek disclosure of that portion of the sealed record.

6. Finally, the respondents assert that the case is not worthy of review because the District Court apprised the public of the nature of the closed proceedings "*to the extent necessary*" (Opposition, p. 8), was "at every stage sensitive to the interests of the news media" (Opposition, p. 26), and "[a]t the close of trial . . . released transcripts with only minor redactions." In fact, however, the District Court's orders greatly minimized the seriousness of the proceedings and gave no hint that the proceedings revolved around possible attempts to corrupt the jury.[6] Further, the District Court did not release the transcript of the proceedings "at the close of trial," but some three weeks after the conclusion of the trial and some six weeks after the conduct of the closed proceedings, by which time the closed proceedings had long since crossed the line from news to history.

In the end, it is not the District Court's intentions or its sensitivity that are at issue here, but rather its summary closure of two critical mid-trial proceedings during Governor Edwards' trial, without affording the waiting petitioners or their nearby counsel even a moment's opportunity to be heard. However well intended, those arbitrary closure orders directly conflict with *Globe* and related precedents of this Court. They should have been set aside swiftly by the Court of Appeals, but were instead affirmed in a decision that undermines established procedural and substantive guarantees of public access to criminal trials.

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[6] The orders blandly described the nature of the incidents that triggered the proceedings as a report that two jurors had discussed "some aspect of the previous trial" and a report that a juror "commented about the actions of one of the defendants in the courtroom." (App. 22a, 24a)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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